

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

472

A

SUPPLEMENTAL JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20, 140

HOLIDAY TOURS INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

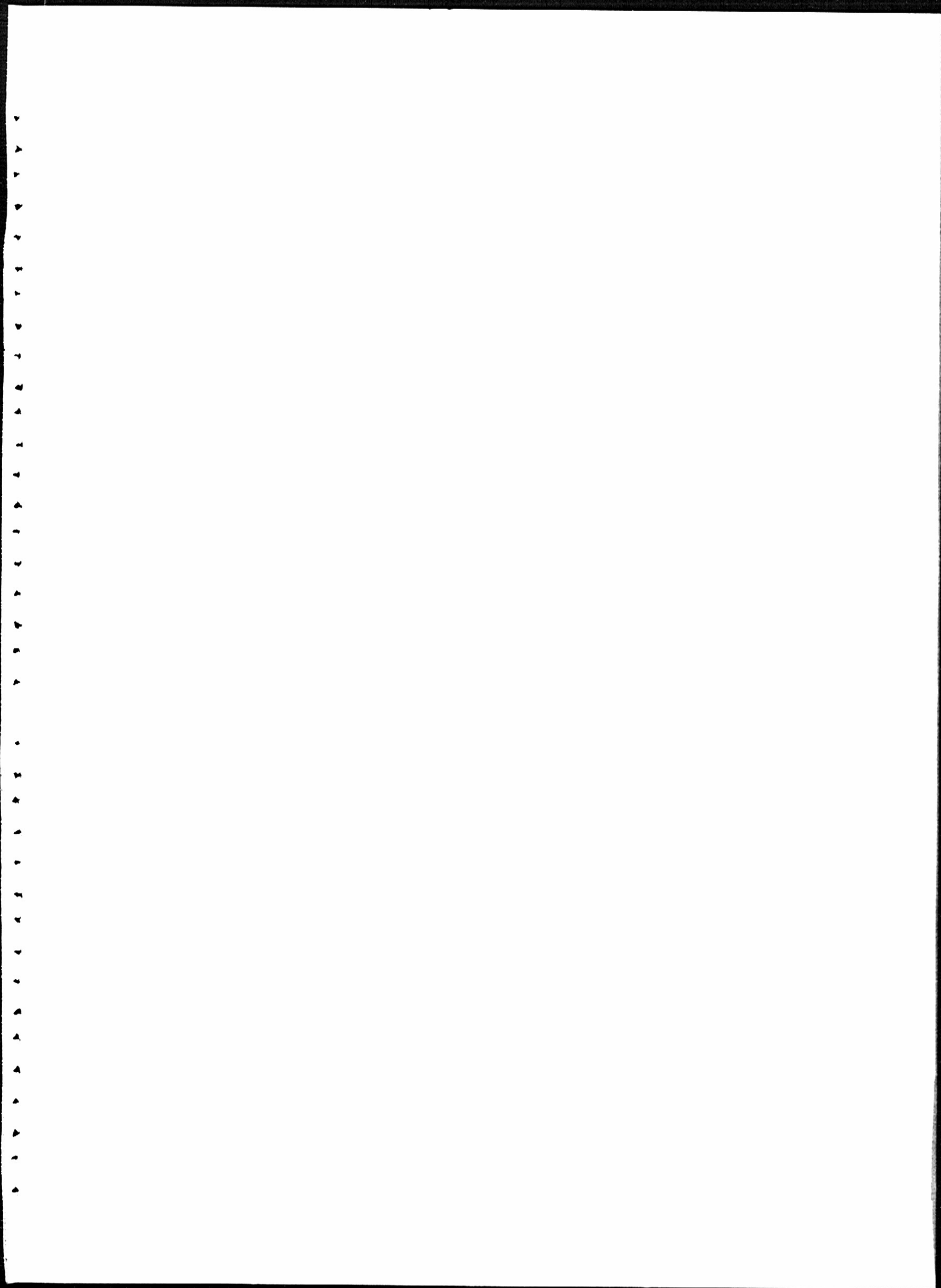
Respondent.

On Petition To Review And Set Aside
Orders Of The Washington Metropolitan
Area Transit Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 27 1966

Nathan J. Paulson
CLERK



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,140

HOLIDAY TOURS, INC.,

Petitioner,

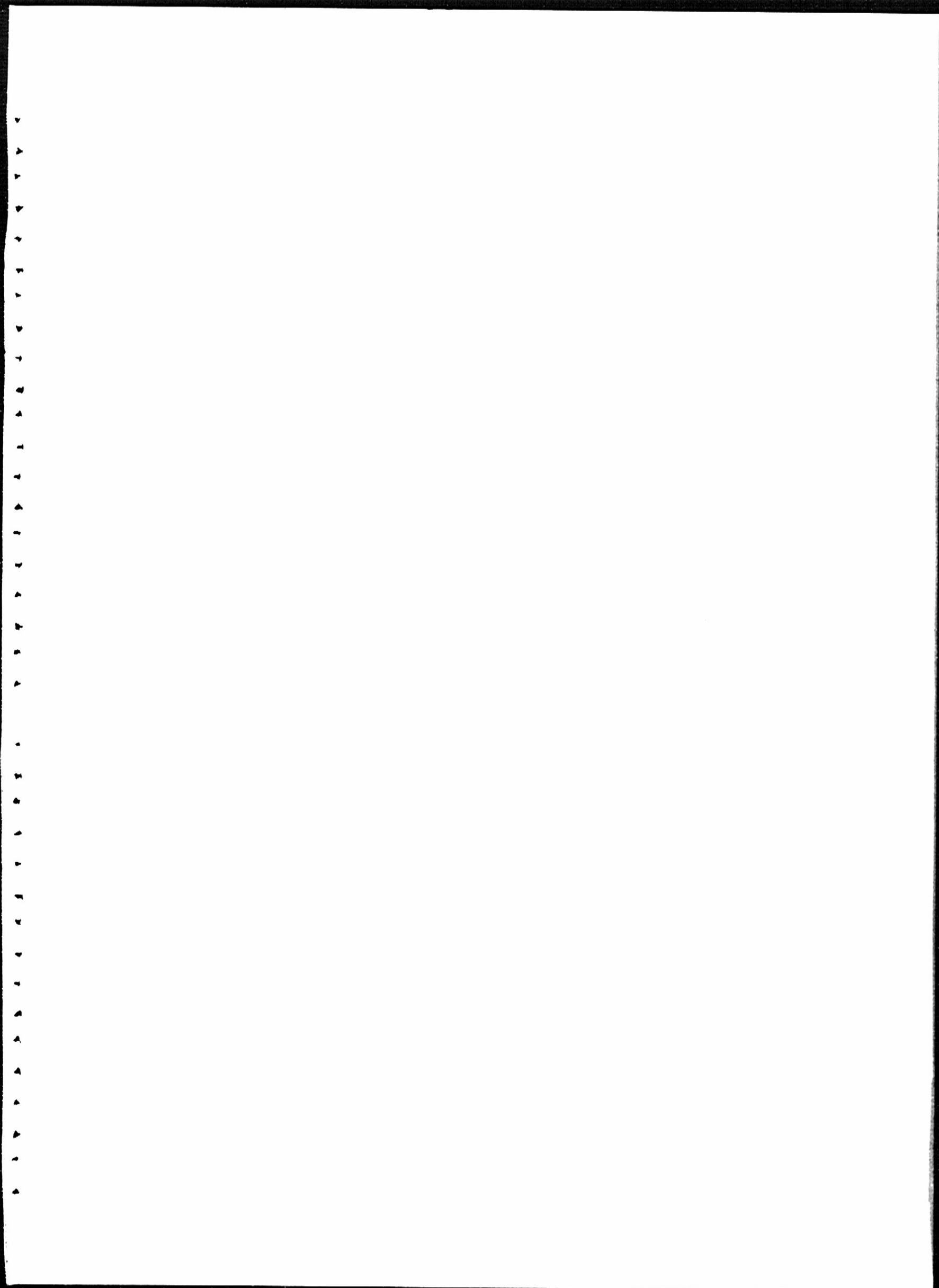
v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Respondent.

On Petition To Review And Set Aside
Orders Of The Washington Metropolitan
Area Transit Commission

SUPPLEMENTAL JOINT APPENDIX



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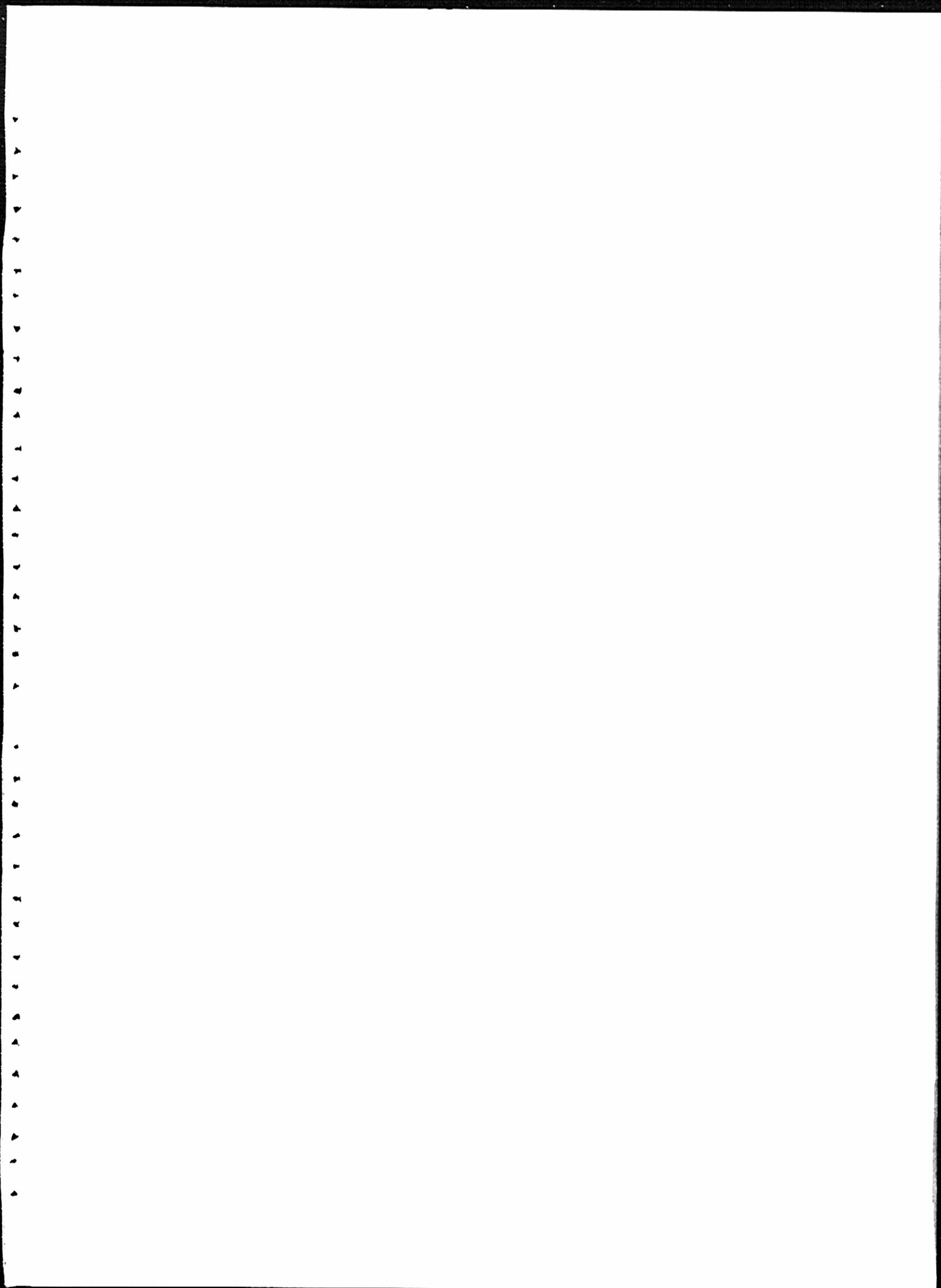
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BEFORE THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION
WASHINGTON, D. C.
ORDER NO. 523

IN THE MATTER OF:

Application of Holiday Tours,)
Inc., for a Certificate of)
Public Convenience and Necessity)
(grandfather).)

Served September 2, 1965

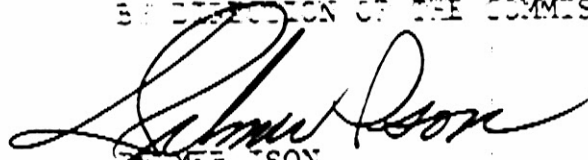
Application No. 18

Docket No. 31

The United States Court of Appeals for the District of Columbia has set aside Orders Nos. 343 and 334, and remanded the matter to the Commission for further appropriate proceedings. The Commission is of the opinion that this matter should be set for further hearing, to enable the parties to present evidence, consistent with the opinion of said court.

THEREFORE, IT IS ORDERED that this matter be, and it is hereby, set for further hearing on Monday, October 25, 1965, at 10:00 a.m., in the office of the Commission, 1815 North Fort Myer Drive, Arlington, Virginia.

BY DEPUTY OF THE COMMISSION:


PALMER ISON
Executive Director

BEFORE THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 536

IN THE MATTER OF:

Served October 19, 1965

Application of Holiday Tours,)
Inc., for a Certificate of)
Public Convenience and)
Necessity.)

Application No. 18

Docket No. 31

On September 2, 1965, by Order No. 523, the Commission set the above matter for further hearing on October 25, 1965. On September 30, 1965, the applicant filed a petition for reconsideration of said order, requesting that the Commission cancel the hearing and issue applicant a certificate. The protestants have filed a reply to said petition, urging denial thereof, on the basis that further hearing is necessary to develop the essential evidence required in order to dispose of inquiries raised by the Court in its Opinion and Order of Remand.

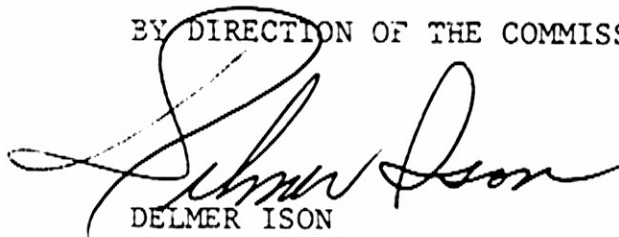
The Commission is of the opinion that further hearing is required to provide all parties an opportunity to present evidence bearing upon and relating to those matters raised in the Court's Opinion. Accordingly, the petition for reconsideration should be denied.

THEREFORE, IT IS ORDERED:

1. That the petition of Holiday Tours, Inc., for reconsideration of Order No. 523 be, and it is hereby, denied.

2. That the location of the hearing scheduled for 10:00 A.M., Monday, October 25, 1965, be, and it is hereby, changed to Hearing Room "C", Interstate Commerce Commission Building, 12th and Constitution Avenue, N.W., Washington, D. C.

BY DIRECTION OF THE COMMISSION:


DELMER ISON
Executive Director

BEFORE THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION
WASHINGTON, D.C.
ORDER NO. 554

IN THE MATTER OF:

Served December 29, 1965

Application of Holiday Tours,)
Inc., for a Certificate of)
Public Convenience and Neces-)
sity ("grandfather").)

Application No. 18

Docket No. 31

APPEARANCES:

LEONARD A. JASKIEWICZ, Attorney for Holiday Tours, Inc., Applicant.

MANUEL J. DAVIS, Attorney for D. C. Transit System, Inc., and Washington, Virginia and Maryland Coach Company, Inc., Protestants.

JOHN R. SIMS, JR., and S. HARRISON KAHN, Attorneys for Alexandria, Barcroft and Washington Transit Company, The Gray Line, Inc., and Diamond Tours, Inc., Protestants.

Before **Charles M. Duke**, Chairman, **Edward D. Storm**, Vice Chairman, and **H. Lester Hooker**, Commissioner.

By Order No. 334, entered after lengthy hearings, the Commission denied the application of Holiday Tours, Inc., for a certificate of public convenience and necessity, based on "grandfather" rights, under Article XII, Section 4(a) of the Washington Metropolitan Area Transit Regulation Compact. Reconsideration of its Order was denied by Order No. 343. Authority was sought to engage in charter and special sightseeing operations by bus¹ between specified points in the Washington Metropolitan District.

¹/ For purpose of this order, a bus is any vehicle with a seating capacity of nine passengers or more, exclusive of the driver.

The above orders were appealed to the United States Court of Appeals for the District of Columbia Circuit, and on July 14, 1965, the Court entered its opinion, which opinion set aside the Orders of the Commission and remanded the case to the Commission "for further appropriate proceedings."

The original application was, and continues to be, protested by D. C. Transit System, Inc.; Washington, Virginia and Maryland Coach Company, Inc.; Alexandria, Barcroft and Washington Transit Company; The Gray Line, Inc.; and Diamond Tours, Inc., all of whom hold authority from the Commission to engage in sightseeing operations. The applicant maintained, following the entry of the aforementioned Court opinion, that the Commission should, on the then existing record, issue a certificate of public convenience and necessity to applicant. The protestants, on the other hand, urged just as strongly that in order to comply with the mandate of the Court further hearings were required. The Commission was unable to see how further hearings could prejudice applicant inasmuch as applicant is presently operating pursuant to Court order. The Commission, in order to penetrate and explore in depth certain areas of uncertainty in its quest for the truth, held further hearings on this matter on October 25, 1965, November 8, 1965, and December 13, 1965.

Every party was afforded a full and complete opportunity to present such testimony as its interest may have appeared. In fact, insofar as new and additional testimony was concerned, the Commission was willing to conduct the hearing as a de novo proceeding, except that the record developed at the prior hearings would, of course, be considered in disposing of the case. The Commission would not allow any procedural issue to thwart its search for the facts.

At the hearing held on October 25, 1965, counsel for applicant elected to rest its case on the previous record. Counsel for applicant offered to adduce additional testimony if requested by the Commission. While the Commission will always feel free to make limited inquiries of counsel concerning matters before it, it will never assume the role of counsel, and will certainly abstain from instructing counsel as to how to present or develop his case.

The protestants, at the hearing held on October 25, 1965, adduced the testimony of certain witnesses which was ruled either inadmissible or irrelevant to this proceeding. Following the testimony of protestants, Mr. Walter Lee Davis, president of applicant, presented certain testimony which will be discussed later. The testimony adduced at the hearings on November 8, 1965, and December 13, 1965, will also be discussed later.

The great majority of "grandfather" applications coming before the Commission within the ninety-day period following March 22, 1961 (the effective date of the Compact creating the Commission), were disposed of without hearing because there was no dispute as to the facts. In those cases where the applicants sought authority to continue bus operations, the normal situation was that the applicant owned buses and operated them pursuant to a certificate of public convenience and necessity issued by the appropriate state authorities and/or the Interstate Commerce Commission. In those cases where the applicants sought authority to continue limousine operations², the applications were dismissed as being exempt from the certificate jurisdiction of the Commission.

In this case, the applicant, Holiday Tours, Inc., held no certificate of public convenience and necessity from any state or federal authority, and it owned no buses on March 22, 1961. Notwithstanding these two important factors, applicant contends that it was bona fide engaged in bus transportation on March 22, 1961, as contemplated by the Compact. Under the rule laid down in Warrenner v. Washington Metropolitan Area Transit Commission, ___ U. S. Appl. D.C. ___, ___ F. 2d ___ (1965), for an operation to be bona fide, it is not necessary that it be legal.

A determination as to whether or not applicant was bona fide engaged in bus operations on March 22, 1961, as contemplated by the Compact, notwithstanding the admitted illegality of such operations, if in fact bus operations were being conducted by applicant, requires a penetrating inquiry into the numerous facets of bus operations.

The Court, in remanding the case to the Commission, stated "the Commission is to make the factual determinations, not on the basis of legal technicalities, but on such things as 'the absence of evasiveness and of deliberate and knowing disregard of the requirements of the law.' " The Court went on to say:

"In this case the Commission should consider and make findings inter alia as to whether the bus operations were openly conducted without attempts at concealment or disguise and in such a manner as to indicate a real intention to offer and conduct a bus sightseeing operation, and whether the applicant intended to comply or believed that it had complied with all applicable Federal and state law...."

²/ Limousines are vehicles with a seating capacity of eight passengers or less, exclusive of the driver.

In addition, the Court deemed it appropriate for the Commission to make certain specific findings, in the following language:

"...In its reconsideration the Commission should make findings as to whether the applicant sold the sight-seeing tours carried by bus in its own name and issued its own tickets therefor, as to whether the tickets were sold on an individual basis for the tours, as to whether the bus drivers (and the tour passengers) were required to conform to the routes, the stops, the timing, the buildings and sites to be visited, and other details as established and directed by the applicant, as to the applicant's responsibility to the tour group and to the public for the tour transportation and operations, and as to any other factor deemed relevant. Among these we think should be whether and to what extent a guide-lecturer was provided by the applicant for the tours, and whether the applicant was alone responsible to the tour group for provision of the transportation for the tours.

"In this connection also consideration should be given and findings made as to whether the applicant would have been responsible to the tour passengers for negligent operation of the bus and for a failure to conduct the tour as outlined in the brochure; and whether the chartering bus company was serving the public directly or was merely an instrument performing a part of a sight-seeing transportation service offered by the applicant."

For purposes of our decision, we find that applicant sold its tickets for its sightseeing tours transported by bus or limousine and that such tickets were issued on an individual basis and in its own name. The drivers were required to conform to the routes, the stops the timing, the buildings and sites to be visited, as directed by applicant. It is customary in charter operations for the chartering party to direct and control the movement of the vehicle, and to tell the chartering bus company and the driver of the bus when and where the bus is to go.

There is no basis for a finding that applicant provided a guide-lecturer for the tours. It is customary in the trade for the bus driver to also act as a guide-lecturer. The cost of furnishing the bus and the driver-guide-lecturer was included in the overall

hourly rate paid by the applicant to the chartering bus company pursuant to published tariffs covering charter rates.

As to whether applicant would have been responsible to the tour passengers for negligent operation of the bus, the president of applicant stated that the buses used had never been involved in any incident to enable this issue to be determined. It would appear however, that in any event the chartering bus company would have been liable inasmuch as it owned the bus, it carried insurance on the bus, the bus was operated pursuant to appropriate authority, the driver was on its payroll, and further, the name of the chartering bus company was clearly displayed on the outside of the bus.

3

As to the advertisements of applicant that it provided sightseeing service by "air-conditioned coach," in view of its policy of chartering buses occasionally from certificated carriers, neither the competing bus companies nor the federal and state regulatory authorities had reason to suspect that any law was being violated.

We think that one important fact in this entire proceeding may have escaped proper attention. Holiday Tours, Inc., was without question, bona fide engaged in sightseeing operations by limousine on March 22, 1961. It had every right to print and sell its tickets in its own name and to transport its passengers in its own limousines. This is what it did. Apparently, it did not always know in advance that occasionally persons to whom individual tickets were sold would constitute a group too large to be transported by limousine. In such cases, buses were chartered to move the group. In the most recent instances, applicant chartered the bus on an hourly basis from Atwood's Transport Lines, Inc., and Atwood furnished the driver, as is customary in charter operations.

We can see nothing wrong with allowing the passengers, who had already purchased tour tickets, to use those tickets for admission on the bus in charter operation. The tour ticket also serves as a means of identification of the passenger in boarding the bus at the various stops along the way. Atwood was being paid the hourly charter rate by applicant and was not concerned about the financial arrangement between applicant and the tour passengers as represented by the individual tickets. The ticket arrangement was between applicant and the tour passengers. Atwood was being paid the tariff rate. It is similar to a public school chartering a bus from an authorized carrier at the published charter rates, and then charging the students an individual fare to cover the school's cost of chartering the bus. This could not be construed as putting the school in the bus business nor making the school liable for negligent operation of the bus.

3/ The date of the single brochure containing the "coach" advertisement was never established.

Even if it were assumed that applicant had exercised that degree of control over the bus operations to constitute it an operation of applicant in the eyes of the law, we need to know more. We need to know whether, in the language of the Court, the operations were conducted in good faith and in the absence of "deliberate and knowing disregard of the law." Since we are concerned primarily with interstate operations, we need to know whether applicant believed it had complied with federal law.

Throughout this proceeding, Walter Lee Davis, president of applicant, has placed much reliance on an alleged conversation he had with a Joseph W. Clarke in 1959, to establish the fact that he had conducted bus operations in good faith and that he had complied with all federal laws. In 1959, and until July, 1960, Joseph W. Clarke was the District Supervisor of the Interstate Commerce Commission in the Washington area, and no one questioned his authority to pass upon the legality of bus operations in this area.

At the original hearing held on April 16, 1963, Mr. Davis stated in regard to the alleged conversation, at page 90 of the transcript:

"I went to the Interstate Commerce Commission and talked to Mr. Clarke up there."

At the hearing on October 25, 1965, Mr. Davis reiterated that he had talked to Mr. Clarke in 1959, and that he was advised that sight-seeing bus operations in the Washington area were exempt from ICC regulations.

At the original hearing the parties were deprived of an opportunity to hear Mr. Clarke's side of the conversation. Mr. Clarke was not called as a witness, and Mr. Davis was prohibited, by the hearsay rule, from stating what Mr. Clarke had said to him. Since Mr. Davis had placed so much importance on his alleged conversation with Mr. Clarke, both at the original hearing and the hearing held on October 25, 1965, the Commission concluded that in fairness to all parties Mr. Clarke should be called as a witness. It made no difference to the Commission which party called him. The important point was that the testimony of Mr. Clarke should provide important clues as to whether or not "the applicant intended to comply or believed that it had complied with all applicable" federal laws.

One of the protestants produced Mr. Clarke at the hearing held on November 8, 1965. Mr. Clarke testified in substance that he did not have any recollection of the name of Walter Lee Davis or Holiday Tours, Inc., but he did not deny that Mr. Davis might have been in his office during the time in question. Mr. Clarke testified, however, that had he been consulted concerning the latter's operations, that he would not have told him that bus operations were exempt from ICC regulations. In response to questions propounded by counsel for applicant, Mr. Clarke stated that it was proper for a limousine operator to charter a bus from an authorized carrier to take a group to whom had been sold individual tickets on a sightseeing tour. This is precisely what applicant did.

Following the hearing held on November 8, 1965, applicant was given an opportunity to present additional evidence at a further hearing held on December 13, 1965. At the hearing held on December 13, 1965, Walter Lee Davis, president of applicant, did not testify, and did not, through any witness, attempt to explain away the testimony of Joseph W. Clarke, which was in direct conflict with the testimony of Mr. Davis, given earlier. The applicant did adduce the testimony of four witnesses, namely, Paul A. Swan, William P. O'Flinn, Herman Franklin Fraser, and Benjamin Gerrivz, which testimony, in the Commission's opinion, corroborates the testimony of Joseph Clarke and substantially discredits the testimony of Walter Lee Davis.

Mr. Swan testified that he, in partnership with Mr. William P. O'Flinn, operated a sightseeing business, consisting of one bus and three limousines, under the name of Federal Tours from 1955 through 1958. The following questions and answers appear in the record, counsel for applicant asking the questions, and Mr. Swan giving the answers:

- Q. "Did you operate a bus?
 A. Absolutely.
 Q. Up to '58?
 A. Through '58.
 Q. Through '58. Why did you stop, if you did?
 A. Well, I got a letter then from the I.C.C. requesting that Mr. O'Flinn and myself come down and see them.
 Q. And, did you go down?
 A. Yes, we did.
-

4/ Transcript, November 8, 1965, pp. 165, 166.

Q. And, as a result of going down, what happened?

A. Well, Mr. Clarke is the gentleman who met us and he told us that we were operating illegally. So then I told him what had happened. So, he said well, he said why don't we just forget about this thing. You stop operating and we won't dig up the past. So, we stopped operating."

The evidence further reveals that the conversation Mr. Swan had with Mr. Clarke, wherein he was advised that the bus operations were illegal, was the only conversation Mr. Swan ever had with Mr. Clarke.

The testimony of William P. O'Flinn merely confirmed and corroborated the above testimony of Paul A. Swan.

Herman Franklin Fraser testified that he bought a sightseeing bus in 1957 and kept it for a few months. In the Spring of 1957, he sold the bus back to Curtis Sightseeing Tours, from whom he originally purchased it. Although he licensed the bus, he never operated it.

Benjamin F. Gerrivz testified that he operated a sightseeing business under the name of Liberty Sightseeing Tours somewhere in the vicinity of 1955 and 1956, and operated one bus.

The testimony of each of the above four witnesses would tend to confirm that prior to 1958, information had emanated from the Interstate Commerce Commission that interstate sightseeing bus operations were exempt from the ICC regulations, but not in a single instance was the source of the information traceable to Mr. Clarke. In fact, it is obvious from the record that Mr. Clarke, in 1958, set out to get the record straight. He made it clear that interstate bus operations within the Washington, D. C. commercial zone were illegal without an appropriate certificate.

The applicant did not commence chartering buses, and then only on a limited scale, until 1958. Applicant never did acquire a bus until after the "grandfather" date. The Commission fails to see the relevancy of information, regardless of its accuracy or inaccuracy, given out some three years prior to the "grandfather" date.

It appears to us that if Walter Lee Davis did not know it, he at least had considerable doubt, as to whether or not he could legally operate a bus. Mr. Davis apparently realized when he chartered the first bus in 1958 that it was illegal for him to operate a bus. He must have realized that in the absence of operating authority from the Commonwealth of Virginia he could not operate between the District of Columbia and the

Commonwealth of Virginia, under the ICC exemption. While the evidence is somewhat unclear, Mr. Davis apparently went to Richmond in the early part of 1961 in an attempt to rectify the situation. Mr. Davis' purpose in going to Richmond, in the words of Mr. Davis, was "Just to have another certificate. Because there is just no sightseeing where you pick up and stay in Virginia itself."⁵ He stated that while in Richmond he was told by Mr. Seibert, Commerce Counsel for the Virginia State Corporation Commission, to get in touch with the Washington Metropolitan Area Transit Commission and "they can give you the whole ball of wax in one fell swoop."⁶ This would strongly indicate that Mr. Davis was interested in something more than just an intrastate certificate. Mr. Seibert's answer⁷ strongly suggests that Mr. Davis was in Richmond to get a Virginia intrastate certificate in order that he might qualify under the commercial zone exemption of the Interstate Commerce Commission.⁸

When we look back on the operation of Holiday Tours, Inc., it is obvious that Mr. Davis showed proper respect for and awareness of, the law. He showed more restraint than many of his fellow operators, who purchased buses only to find out their operations were illegal. Applicant conducted its limousine operations in its own limousines, and when it had a group too large to be accommodated by limousine, it chartered a bus from an authorized bus company.

⁵/ Transcript, October 25, 1965, p. 119.

⁶/ Transcript, October 25, 1965, p. 118.

⁷/ Mr. Seibert properly advised Mr. Davis to contact this Commission in regard to authority for future interstate operations. The Interstate Compact creating this Commission had already been consummated, and upon the Commission's coming into official existence on March 21, 1961, the ICC's jurisdiction over bus operations within the Washington area ceased.

⁸/ One of the primary factors in the Warrenner case, supra, which prompted the Court to hold that Warrenner was bona fide engaged in bus operations between the District of Columbia and the Commonwealth of Virginia was that Warrenner had been issued an intrastate certificate by the Virginia State Corporation Commission. Warrenner had relied heavily on the Virginia intrastate certificate to bring his operation within the ICC Commercial Zone exemption.

The inference might be drawn from the record that since applicant purchased bus tags⁹ for one or more of its limousines in the District of Columbia and transported up to ten or eleven children therein, applicant should at least be granted a certificate of public convenience and necessity authorizing special sightseeing operations in vehicles with a seating capacity of eleven passengers or less, exclusive of the driver, between points within the District of Columbia. No one advanced this specific argument and we do not consider it valid.

The Compact states that vehicles "having a seating capacity of eight passengers or less in addition to the driver" shall be exempt from the certificate requirements of the Commission except as to rates and insurance. Regardless of the number of passengers transported and regardless of the type of license acquired by applicant for the limousines in question, the seating capacity still was eight passengers exclusive of the driver; thus applicant could not be said to operate any vehicles larger than limousines, which are exempt.

The Commission finds and concludes that Holiday Tours, Inc., was not bona fide engaged in the transportation of passengers in motor vehicles with a seating capacity in excess of eight passengers, exclusive of the driver, on or before March 22, 1961.

THEREFORE, IT IS ORDERED, that the application of Holiday Tours, Inc., for a "grandfather" certificate of public convenience and necessity be, and it is, hereby denied.

BY DIRECTION OF THE COMMISSION:



DELMER ISON
Executive Director

^{9/} Prior to March 22, 1961, sightseeing bus operations were exempt from certificate regulations within the District of Columbia. A bus tag could be routinely acquired by anyone after meeting certain informal administrative requirements.

BEFORE THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION
WASHINGTON, D.C.
ORDER NO. 573

IN THE MATTER OF:

Served February 25, 1966

Application of Holiday Tours,)
Inc., for a Certificate of)
Public Convenience and Neces-)
sity ("grandfather").)

Application No. 18

Docket No. 31

By Order No. 554, issued December 29, 1965, the Commission denied the "grandfather" application of Holiday Tours, Inc., for a certificate of public convenience and necessity. On January 28, 1966, Holiday Tours, Inc., filed a petition for reconsideration of said Order, specifying twelve alleged errors.

No new matter has been raised. However, it appears that petitioner has misconstrued some of our findings and the reasons leading to those findings. Therefore, it is appropriate to make some supplemental comments.

Because of the questions raised in the court opinion, the Commission felt that fairness to all parties required the opportunity for them to present any pertinent evidence not previously adduced. The applicant was the beneficiary of this ruling as well as the protestants. That it did not or could not gain from the ruling does not give it ground to complain.

Applicant remains unable or unwilling to recognize the distinction found by the Commission between the transportation service it rendered when it sold tickets and operated its limousine service, and the transportation service rendered for it by the chartering carriers. We have recognized that Holiday Tours was engaged in a bona fide transportation service, but only when said service was operated by it in its limousine vehicles. This service did in fact require advertising, sales of individual tickets, and tours conducted openly and without concealment, in vehicles owned by and identified as belonging to the applicant. We cannot tell from the record, since no patron testified, whether the patron wanted or desired his tour in a limousine or a bus. But that is immaterial. In most cases, the patron was in fact transported by the applicant in its limousine. Occasionally, as noted, patrons were transported by the chartering carrier in the chartering carrier's vehicle. As we have found, that transportation was performed by an authorized carrier. There was no bus transportation by the applicant, bona fide or otherwise. The only bus

operations actually conducted were by an authorized, certificated carrier. Applicant's own evidence (Exhibit No. 1) reveals the carrier's (Atwood's Transport Lines, Inc.) state of mind, i.e., that it, Atwood, was the person engaged in the bus transportation, and was not merely a lessee or agent of the applicant. The law does not contemplate giving a "grandfather" certificate to one engaged in selling sightseeing tours, but to one who was "bona fide engaged in transportation." Holiday Tours could have sold a million tickets a year, but unless it was engaged in performing bus transportation, it would not be entitled to a certificate. The Commission's finding of applicant's respect for the law was directed to two distinct phases: first, the sightseeing service of the applicant using limousines, and second, the fact that applicant did not operate its own buses, which would have been illegal, but rather chartered the buses from authorized carriers, which was legal. (See testimony of Mr. Clarke, Transcript pp. 165-66).

The petitioner for reconsideration relates: "It is difficult to comprehend why the Commission placed such great weight on the testimony of Clarke...and placed so little on what four witnesses did remember in 1958."

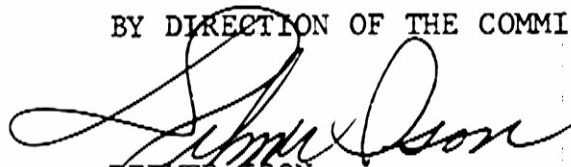
"The only purpose in adducing testimony from the four witnesses was to show that at one time apparent misinformation was emanating from the Commission (I.C.C.)." That may have been applicant's purpose, but the testimony has much broader relevance than that. While Clarke stated that he did not recall Davis, he emphatically denied that he had ever informed anyone that I.C.C. authority was not required. To the contrary, he said it would have been illegal to operate without a certificate or under the commercial zone exemption. Applicant's witnesses confirmed Clarke's testimony--indeed two of them related that they stopped bus operations specifically because Clarke told them to stop. This event occurred in 1958. Thus, at the very time Davis was beginning Holiday Tours, the I.C.C. was moving to stop illegal operations. We could not give any credibility to Davis' self-proclaimed state of mind. Applications cannot be granted upon one's proclaimed state of mind, even where the testimony is credible. As we have previously stated, the facts adduced point to one thing: Holiday Tours was operating an exempt limousine sightseeing transportation service only.

Cross-examination of Mr. Clarke clearly reveals that the I.C.C. representative considered the bus transportation to be that of the certificated carrier where a limousine sightseeing operator chartered one of its vehicles. Not only could the bus company be instructed as to start, stop, pickup, and discharge--"that is usually what they do on charters." (Tr. 166). It is readily apparent that the certificated carrier was the person engaged in the bus transportation.

The Commission is of the opinion and finds that its Order No. 554 was correct in every respect and that the application of Holiday Tours, Inc., for reconsideration of said Order should be denied.

THEREFORE, IT IS ORDERED that the application of Holiday Tours, Inc., for reconsideration of Order No. 554 be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION


DELMER ISON
Executive Director

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Before the
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

In the Matter of:	:
	:
Application of Holiday Tours, Inc.,	: Application No. 18
for a Certificate of Public Convenience	:
and Necessity.	: Docket No. 31

Hearing Room C,
Interstate Commerce Commission
12th St. & Constitution Ave.,
Washington, D. C.,
Monday, October 25, 1965.

The above-entitled matter came on for further hearing pursuant to notice, before the Washington Metropolitan Area Transit Commission, at 10:00 o'clock a.m., Judge H. Lester Hooker, Commissioner, presiding.

BEFORE:

C. M. DUKE, Brig. Gen., USA, Chairman of the Commission.

EDWARD D. STORM, Vice Chairman

H. LESTER HOOKER, Commissioner.

APPEARANCES:

* * * * * *

[4]

COMMISSIONER HOOKER: The Commission will hear this case de novo. It is known by counsel of record that I am the only Commissioner that participated in the former hearing, and most likely, if it were not heard de novo, they might be -- give a valid reason for reversal on appeal.

[8]

MR. JASKIEWICZ: One of the things that Protestants said, "We don't see why the Applicant is worried about this hearing. He can't be hurt. He can operate under the provisions of the Compact. What is he squawking about?"

I'll tell you what he's squawking about. He has lost eight accounts during this period. Why? Because the Protestants say this Applicant doesn't have a certificate, it is pending, and nobody knows what is going to happen. And I can tell you the accounts he has lost. It has cost him \$100,000 a year. So

[9]

you say he is not prejudiced by additional hearing and further hearing? I say it is wrong, and he is hurt.

MR. JASKIEWICZ: Well, if your Honor please, if your Honor's ruling is going to stand as it is and set this matter for hearing de novo, then we would have no alternative but to ask for a continuance. And I think that would be in line with what my brother has already indicated, that he is not prepared to go ahead under de novo proceeding.

[25]

VICE CHAIRMAN STORM: Well, if Judge Hooker will excuse me again, it appears to me that we were trying to be fair to everyone and say now if you feel that anything in addition is

needed, either you, if your case isn't perfect, it is good but not perfect and you want to make it perfect, or the other side, if they feel that anything at all should be in there to clarify, to make it better for you or for them -- I imagine for them, if they present it -- you would have the opportunity to do it now.

It is not our intention to force you to do something you don't want to do or don't feel is necessary. But I thought that we were being fair in throwing it open so that you or the protestants would be able to present anything at all in reference to these particular findings which the Court directs should be made, throwing it open de novo from that point.

[29]

MR. JASKIEWICZ: Yes, your Honor. And in that particular finding I think that the Court is almost asking for the impossible, because I as a lawyer, I am confident in the event of any claim of negligent action or negligent operation of the bus by a client of mine on a Holiday Tours tour, I would sue Holiday Tours, I would sue the bus company, I would sue the bus driver, and I would sue everybody within shouting distance.

So when you say is Holiday Tours responsible, it depends on the particular facts of that particular negligent action and negligent operation, but I can assure you that any lawyer in the practice of negligence would be suing them.

And I further point out to you that all of the open advertising, the open conduct of operations, would lead anyone to the conclusion that Holiday Tours was responsible. That is my feeling, your Honor, and I think the record --

[30]

MR. JASKIEWICZ: I am not going to admit on this record that my client is responsible to any negligent act that might take place, because it might prejudice him in a case in the District Court or Court of Common Pleas. I just won't do it, but I think any lay person who purchases a ticket that says "Holiday Tours, Inc." on it is going to sue Holiday Tours. Now to that extent I will agree with you. But I am certainly not going to admit from a negligence point that he is responsible.

[38]

CHAIRMAN DUKE: Since the Court has called the Commission's attention particularly to this element of the problem, I think it would be appropriate for you to be given the opportunity to submit in any evidence even at this date that you might feel bears on that problem, which indicates whether or not the company believed that it had complied with all applicable Federal and state law. And I note, for example, in a cursory

reading of the record right now, that you attempted to --

[39]

Mr. Davis attempted to indicate a conversation that he had had with Mr. Clark of the Interstate Commerce Commission, but that was ruled inadmissible because of hearsay.

[41]

CHAIRMAN DUKE: Counsel, you understand, of course, that the thrust of our questioning in the last thirty minutes or so has been to indicate that there are gaps in the testimony and that possibly you might want to supply additional evidence to fulfill the requirement.

We are again giving you that opportunity, and the decision of course, is yours as to whether you want to stand on the record as it is now constituted or whether you would like to introduce additional evidence.

[48]

VICE CHAIRMAN STORM: It may be you will have rebuttal.

MR. JASKIEWICZ: We may be here several weeks on rebuttal. I don't know.

[49]

MR. JASKIEWICZ: Well, before we get into this, we of course are going to enter an objection to any evidence by any

of the protestants. This matter was the subject of a hearing; all the protestants waived any right to present evidence at the original hearing. They did it en masse. They didn't want to put on any evidence at all. They constantly said the burden

[50]

is on the applicant. They did nothing except sit back and take potshots at our testimony and our evidence.

Now to allow these protestants after in my opinion they have completely waived their right to present evidence at the original hearing -- to allow them to come in to bolster up whatever case they may have is patently unfair and prejudicial to the applicant, and we object to any evidence whatsoever.

COMMISSIONER HOOKER: The objection is overruled. Come around.

[116]

MR. DAVIS: So we told him that we wanted to see about getting an intrastate license to connect with the D. C. license.

[128]

COMMISSIONER HOOKER: Were the drivers under your complete supervision and control at all times?

MR. DAVIS: Yes, sir.

COMMISSIONER HOOKER: Under your complete direction?

MR. DAVIS: Yes, sir. They went exactly where we told them to go. We set the pattern for them and told them the time to get there, and until such time as they got familiar with the pattern we had one of our guides with him until he was completely broken in.

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CHAIRMAN DUKE: B-ut it is still your understanding that as of the 22d of March, 1961, you were operating in an entirely legal manner.

MR. DAVIS: Yes, sir.

CHAIRMAN DUKE: And that you did not at that time require an ICC certificate.

MR. DAVIS: That's correct, sir. The ICC never stopped me, said that I was illegal in any shape, form or fashion.

[136]

MR. DAVIS: Yes, sir. And we had practically every account on 240 coming in: Rockville Plaza, the Governor's House, Intown Chevy Chase, the Bethesdan. We had the Intown Chevy Chase -- I mean Intown Silver Spring, the Georgia, Connecticut Inn, Southgate, Holiday Inn at Arlington. And since this has all been going on I've lost all of those accounts. I lose about \$100,000 a year business now just because of the certificate. In fact, for six weeks we were out of business last summer.

[147]

MR. KAHN: Are you presently employed, Mr. Clarke?

MR. CLARKE: No, sir.

[148]

MR. CLARKE: From about March, 1942 until July, 1960.

MR. KAHN: What were your duties as a District Supervisor?

MR. CLARKE: Well, I dealt with the general public and with motor carriers in connection with all matters pertaining to the transportation of property and passengers in interstate commerce.

MR. KAHN: Did the office that you headed in Washington, D. C., embrace the so-called Washington Metropolitan area or the Washington, D. C. Commercial Zone as defined by the Interstate Commerce Commission?

MR. CLARKE: The Washington, D. C. Commercial Zone.

MR. KAHN: Mr. Clarke, I direct your attention to the agent sitting at the table in a brown suit. Do you recognize this gentlemen?

MR. CLARKE: No, sir.

MR. KAHN: Does the name Walter Davis recall anything to you?

MR. CLARKE: No, sir.

MR. KAHN: Does the name Holiday Tours mean anything to you?

MR. CLARKE: No, sir.

MR. KAHN: Now --

MR. CLARKE: That is as of 1960.

MR. KAHN: Yes, Now Mr. Clarke, in your capacity as District Supervisor, I would assume that a number of people may have come to your office for information with respect to the Interstate Commerce Commission and the regulations thereunder and

[149]

assuming that Mr. Davis, the man to whom I had pointed, came to your office to inquire with respect to the Interstate Commerce Commission regulations for the operation of motor buses in the transportation of passengers for compensation, in interstate commerce, that is within the Washington, D. C. Commercial Zone, including parts of Maryland, the District of Columbia and Virginia, what would you have told such a person?

MR. CLARKE: Well, there were two methods by which they could operate. One was by getting specific authority in the form of a certificate from the Interstate Commerce Commission. And the other was under the exemption of Section 203(b)(8) of the Interstate Commerce Act.

MR. KAHN: Would you have told anyone, Mr. Clarke, that no certificate was required for operations in interstate commerce for the transportation of passengers in a motor bus unless they had either a certificate or were exempt?

MR. JASKIEWICZ: I object to that question, extremely leading, your Honor. I thought we were here to get the testimony of Mr. Clarke, not Counsel.

Now could we have a question that Mr. Clarke could answer?

MR. KAHN: I thought the question was quite clear.

MR. JASKIEWICZ: It was very clear, it suggested the answer, extremely leading. We want Mr. Clarke to testify.

[150]

GENERAL DUKE: The objection is overruled.

You can answer the question.

MR. CLARKE: Would I have -- let's have the question.

MR. KAHN: Would you read the question to the witness, Mr. Reporter?

(Question read)

MR. CLARKE: I would not.

MR. KAHN: Would you have told anyone, Mr. Clarke that operations could have been continued while such a person were

seeking an exemption under the provisions of the Interstate Commerce Act?

MR. CLARKE: I would not.

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MR. JASKIEWICZ: In other words, Mr. Kahn told you what the testimony was. Did he give you an opportunity to look at the transcript?

MR. CLARKE: Well, it was read from the transcript.

MR. JASKIEWICZ: Did you have it there?

MR. CLARKE: Yes.

MR. JASKIEWICZ: Did you read it?

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MR. CLARKE: No, sir.

MR. JASKIEWICZ: You did not read it?

MR. CLARKE: No, sir.

MR. JASKIEWICZ: Would you tell us who you do consulting work for?

MR. CLARKE: Gray Line, Inc.

MR. JASKIEWICZ: Gray Line, Inc.?

MR. CLARKE: Yes.

MR. JASKIEWICZ: That is one of the protestants here today?

MR. CLARKE: I don't know.

MR. JASKIEWICZ: Mr. Kahn did not inform you whether or not that party was a protestant?

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MR. CLARKE: No.

MR. JASKIEWICZ: I see. You receive compensation from Gray Line, Inc., at the present time?

MR. CLARKE: Well, it is just on a six-month basis, from May to October each year, one day a month.

MR. JASKIEWICZ: One day a month?

MR. CLARKE: Yes, I handle the safety part for them.

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MR. JASKIEWICZ: Now, is it your purpose in testifying here to suggest to the Commission that Mr. Davis did not come into the Interstate Commerce Commission Regional Office?

MR. CLARKE: He may have been in, yes.

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MR. JASKIEWICZ: Did you have a responsibility for enforcing the Interstate Commerce Law and regulations as to unlawful operations?

MR. CLARKE: Yes, sir.

MR. JASKIEWICZ: Now, from 1957 -- you resigned or retired in 1960?

MR. CLARKE: Yes, that is right.

MR. JASKIEWICZ: From 1957 to 1960 did you, do you recall, institute any investigation as to the operations of Holiday Tours, Inc.?

MR. CLARKE: No.

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MR. JASKIEWICZ: Now, during the period 1957 to 1960, do you recall receiving any informal complaint from any of the -- from anyone as to the operations of Holiday Tours, Inc.?

MR. CLARKE: No, sir.

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MR. JASKIEWICZ: Now, if a limousine operator of that type came to you and said "You discouraged me, Mr. Clarke, from putting nine, ten or more paying passengers in my limousine, and if I have a day in which I have 12 or 14 people, I have got a problem, is there any way I can get around it?" And if that individual asked you "Could I then charter a bus to take my people down to Mt. Vernon and stop off at Lincoln Memorial, Jefferson Memorial," what would you have told them?

MR. CLARKE: Well, if the bus operator had interstate operating rights to perform the service, I would say then he could charter a bus.

MR. JASKIEWICZ: He could charter a bus and go down?

MR. CLARKE: Yes.

MR. JASKIEWICZ: And under those circumstances he could direct the bus company as to where to stop, when to stop, when to pick up the passengers and when to discharge the passengers, is that correct?

MR. CLARKE: Providing it is a charter operation.

MR. JASKIEWICZ: Yes.

So that any limousine operator then could do the same -- limousine sightseeing operation, could do the same thing by chartering buses say from D. C. Transit, at Woods or AB&W to the extent they are operating.

MR. CLARKE: If they have the authority to perform.

MR. JASKIEWICZ: Was there any limitation, Mr. Clarke, as to what

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instructions the limousine sightseeing operator could give to the chartering bus company?

MR. CLARKE: I don't quite get your question.

MR. JASKIEWICZ: Let me rephrase it this way?

In 1957 did the Interstate Commerce Commission, particularly your office, issue any instructions which would limit or in any

way restrict the instructions which a limousine sightseeing operator could give to the bus company if it chartered a bus?

MR. CLARKE: No.

MR. JASKIEWICZ: In other words, it could give any kind of instructions it wanted provided the bus company accepted those.

MR. CLARKE: Providing it was a lawful charter.

MR. JASKIEWICZ: Yes, if it was a lawful charter.

MR. CLARKE: Yes.

MR. JASKIEWICZ: The bus company could be instructed as to start, stop, pickup, discharge.

MR. CLARKE: That is usually what they do on charters.

MR. JASKIEWICZ: On sightseeing charters that is usually what they do.

MR. CLARKE: That is right.

MR. KAHN: Mr. Clarke, there were a number of questions

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by Counsel for Holiday Tours about chartering buses from certified carriers.

In your opinion, under those circumstances, who was the carrier, the person who chartered the bus or the bus company who provided the service? Who had in your opinion --

MR. CLARKE: The company that provided the service.

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GENERAL DUKE: All right, Thank you very much, The Commission will take this case under advisement, Thank you very much.

MR. JASKIEWICZ: Is the record closed?

GENERAL DUKE: Yes.

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PAUL A. SWAN was called as a witness herein, and having been duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JASKIEWICZ:

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MR. JASKIEWICZ: And, prior to that, sir, did you have any further connection in the sightseeing business?

MR. SWAN: Yes, I did. I was a partner in Federal Tours from 1955 through 1958.

MR. JASKIEWICZ: What was Federal Tours?

MR. SWAN: It was a company, partnership between William P. O'Flinn and myself.

MR. JASKIEWICZ: What type of business was Federal Tours?

MR. SWAN: Well, we had one bus and three limousines.

MR. JASKIEWICZ: What type of business did you conduct?

MR. SWAN: Sightseeing tours.

MR. JASKIEWICZ: In what years did you operate?

MR. SWAN: We operated the bus '56 through '58.

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MR. JASKIEWICZ: Where did you operate?

MR. SWAN: In the metropolitan area.

MR. JASKIEWICZ: What do you mean by Metropolitan area?

MR. SWAN: Well, Washington, Arlington, Alexandria, Mount Vernon; even made pickups in Maryland.

MR. JASKIEWICZ: Now, prior to operating the bus and particularly to Mount Vernon, Virginia, did you contact any representative of the Interstate Commerce Commission?

MR. SWAN: I most certainly did before we ever operated the bus before we ever took it outside the city. I went to the Interstate Commerce Commission to Mr. Joseph Clark's office.

MR. JASKIEWICZ: What was the purpose of that visit, Mr. Swan?

MR. SWAN: I wanted to find out just what I had to do or could do as far as operating a bus.

MR. JASKIEWICZ: What was the result of your visit to the office?

MR. SWAN: Well, I went into his office and his secretary, I guess it was his secretary, met me and she told me that, asked me what I wanted. I told here. And, so she handed me a map and

told me that I didn't need an I.C.C. certificate to operate in the metropolitan area. I said, you mean that I can operate this bus anywhere in this enclosed area that you have on this map? And she said, absolutely. She said there was some kind of a law passed during the war, that I was exempt or the bus was exempt in the metropolitan area, so I believed she was right and I didn't question her any

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further.

MR. JASKIEWICZ: Did you operate a bus?

MR. SWAN: Absolutely.

MR. JASKIEWICZ: Up to '58?

MR. SWAN: Through '58.

MR. JASKIEWICZ: Through '58. Why did you stop, if you did?

MR. SWAN: Well, I got a letter then from the I.C.C. requesting that Mr. O'Flinn and myself come down and see them.

MR. JASKIEWICZ: And, did you go down?

MR. SWAN: Yes, we did.

MR. JASKIEWICZ: And, as a result of going down, what happened?

MR. SWAN: Well, Mr. Clark is the gentleman who met us and he told us that we were operating illegally. So then I told him what had happened. So, he said well, he said why don't we just forget about this thing. You stop operating and we won't dig up the past. So, we stopped operating.

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WILLIAM P. O'FLINN: was called as a witness herein, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JASKIEWICZ:

[175]

MR. JASKIEWICZ: Mr. Swan previously testified relating to Federal Tours and referred to a Pat O'Flinn as being his partner. Were you that gentleman?

MR. O'FLINN: Yes.

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MR. JASKIEWICZ: Now, there came a time according to Mr. Swan that in 1958 you were advised by the Interstate Commerce Commission through Mr. Clark's office that you were operating illegal, is that true?

MR. O'FLINN: Yes.

MR. JASKIEWICZ: And you discontinued operations?

MR. O'FLINN: Yes.

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MR. JASKIEWICZ: Now, did you have any occasion to call the Interstate Commerce Commission?

MR. FRASER: Yes, I did. Before I bought, I was negotiating to buy the bus and I called down to the office and I was informed that as long as I was legally with a bus tag of Washington and legal and properly insured, I could operate the bus around for Federal buildings for sightseeing only and also going back and forth to Arlington Cemetery because it was Federal property and that is the information I had, so I bought the bus.

MR. JASKIEWICZ: Did you have any occasion, Mr. Fraser, to go in to the

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Interstate Commerce Commission office?

MR. FRASER: I came down to the office and the gentleman I talked to, I don't know who, I can't recall any name, and he gave me a little diagram, a map or something. It was a metropolitan thing, blue something, that I could operate in that area, but all I was wanting to do is operate around the Federal buildings and go maybe to Arlington cemetery and turn back.

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MR. JASKIEWICZ: Did you inquire, Mr. Gerrivz, as to what was necessary

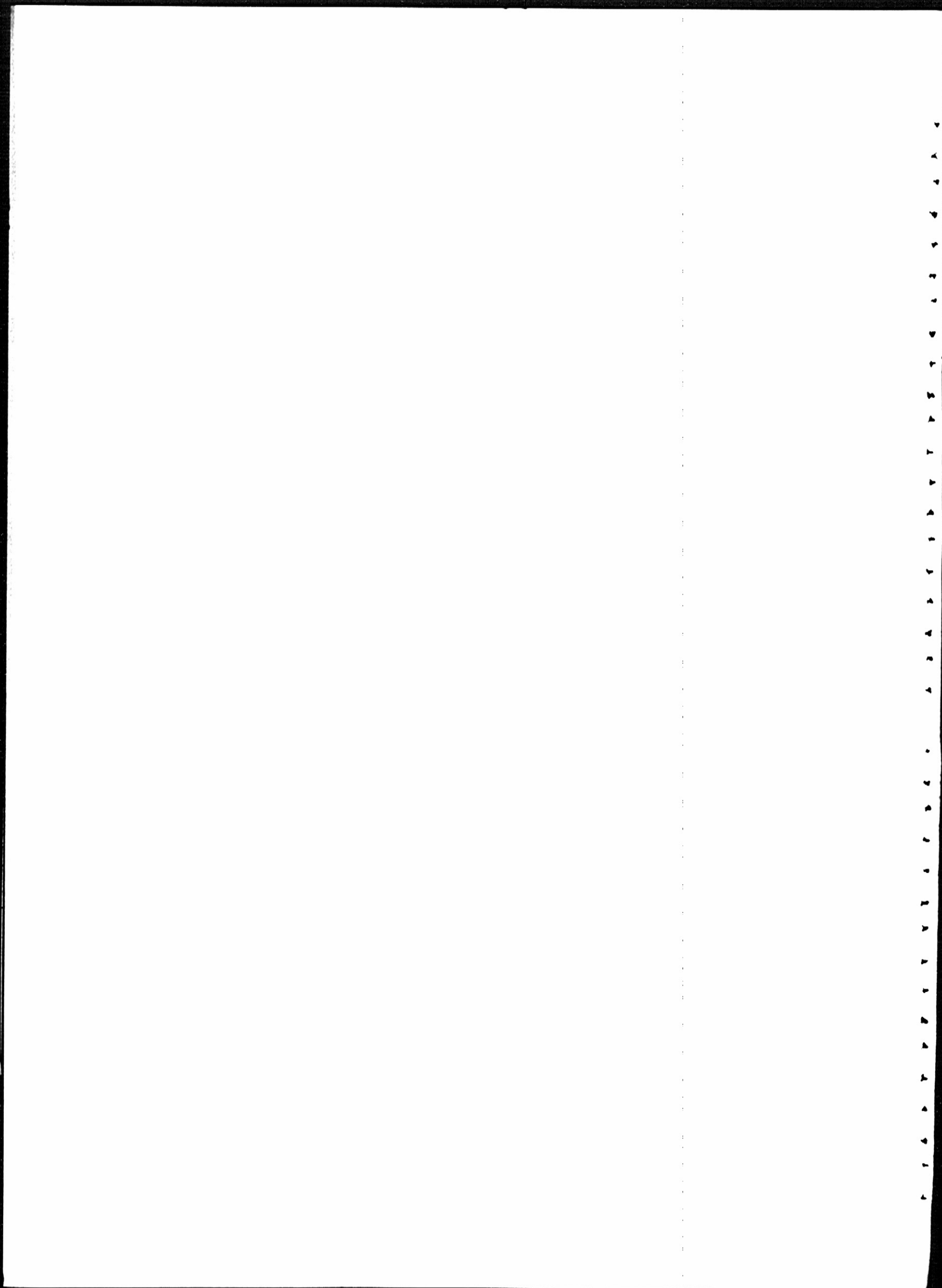
[182]

to operate?

MR. GERRIVZ: Yes, before we bought the bus, a partner and I, Don Everett, we came to this building and spoke to some man that had charge of the transportation of buses at that time, and asked him and he said that a certificate, license wasn't required at that time.

MR. JASKIEWICZ: And then you operated it?

MR. GERRIVZ: That is right, sir.



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BRIEF FOR PETITIONER

UNITED STATES COURT OF APPEALS ^{United States Court of Appeals}
FOR THE DISTRICT OF COLUMBIA CIRCUIT ^{for the District of Columbia Circuit}

No. 20,140

HOLIDAY TOURS, INC.,

FILED SEP 27 1966

Nathan J. Paulson
CLERK

Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Respondent.

On Petition To Review and Set Aside
Orders Of The Washington Metropolitan
Area Transit Commission

LEONARD A. JASKIEWICZ

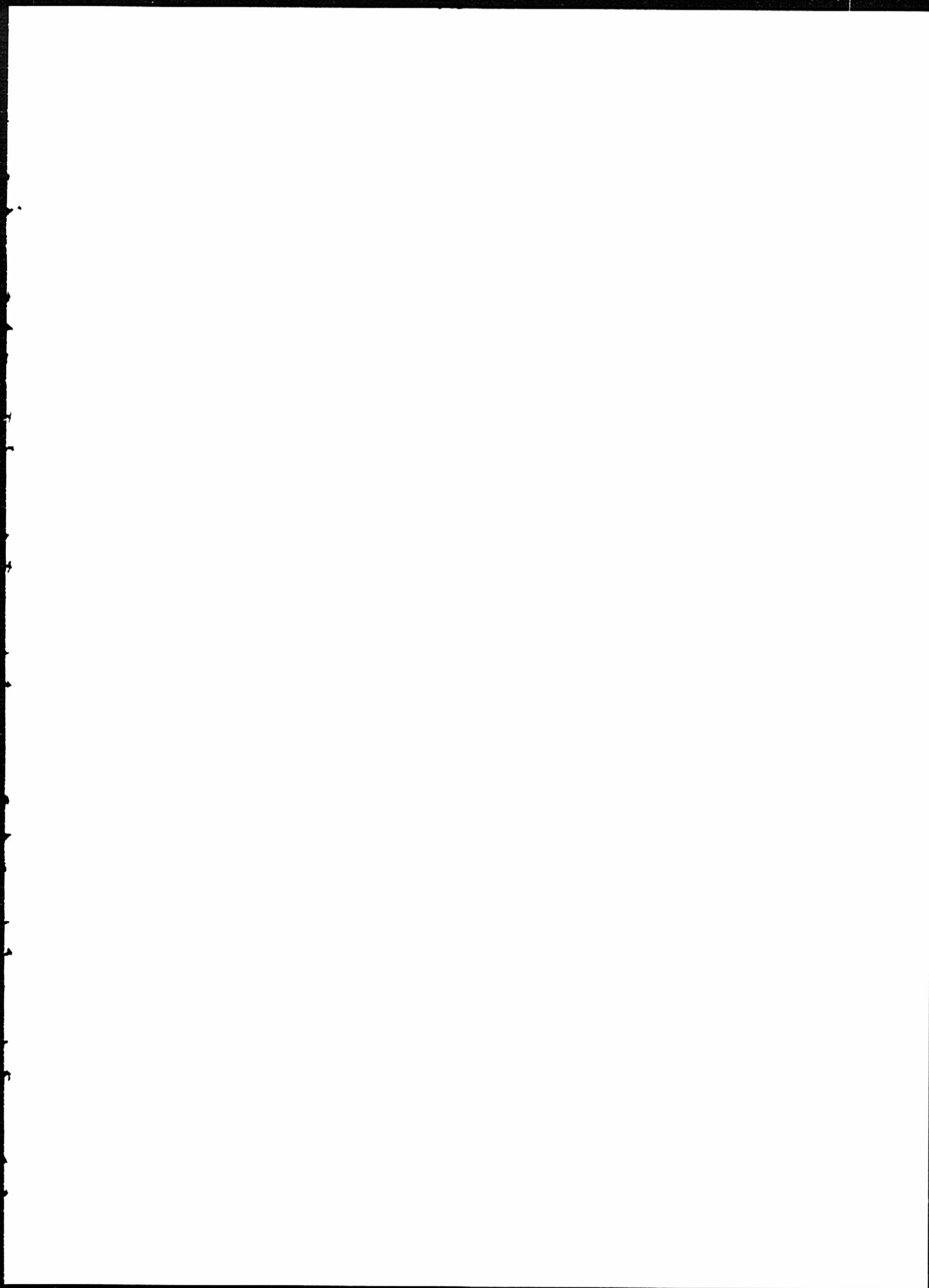
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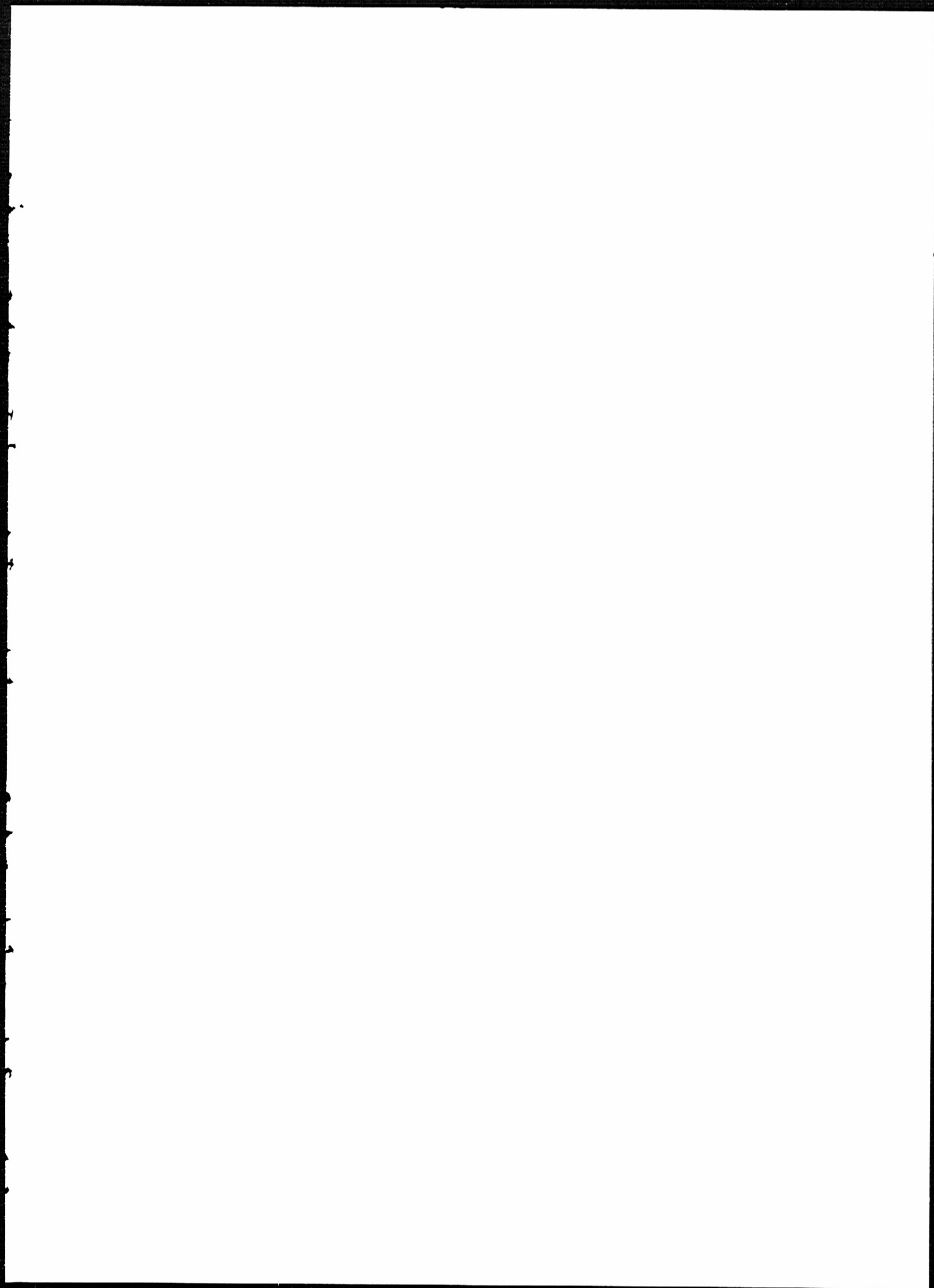
(i)

QUESTIONS PRESENTED

I. Whether the Commission's finding that the bus transportation in question was not performed by petitioner and thus that petitioner is not entitled to a certificate under the statute, is supported by substantial evidence.

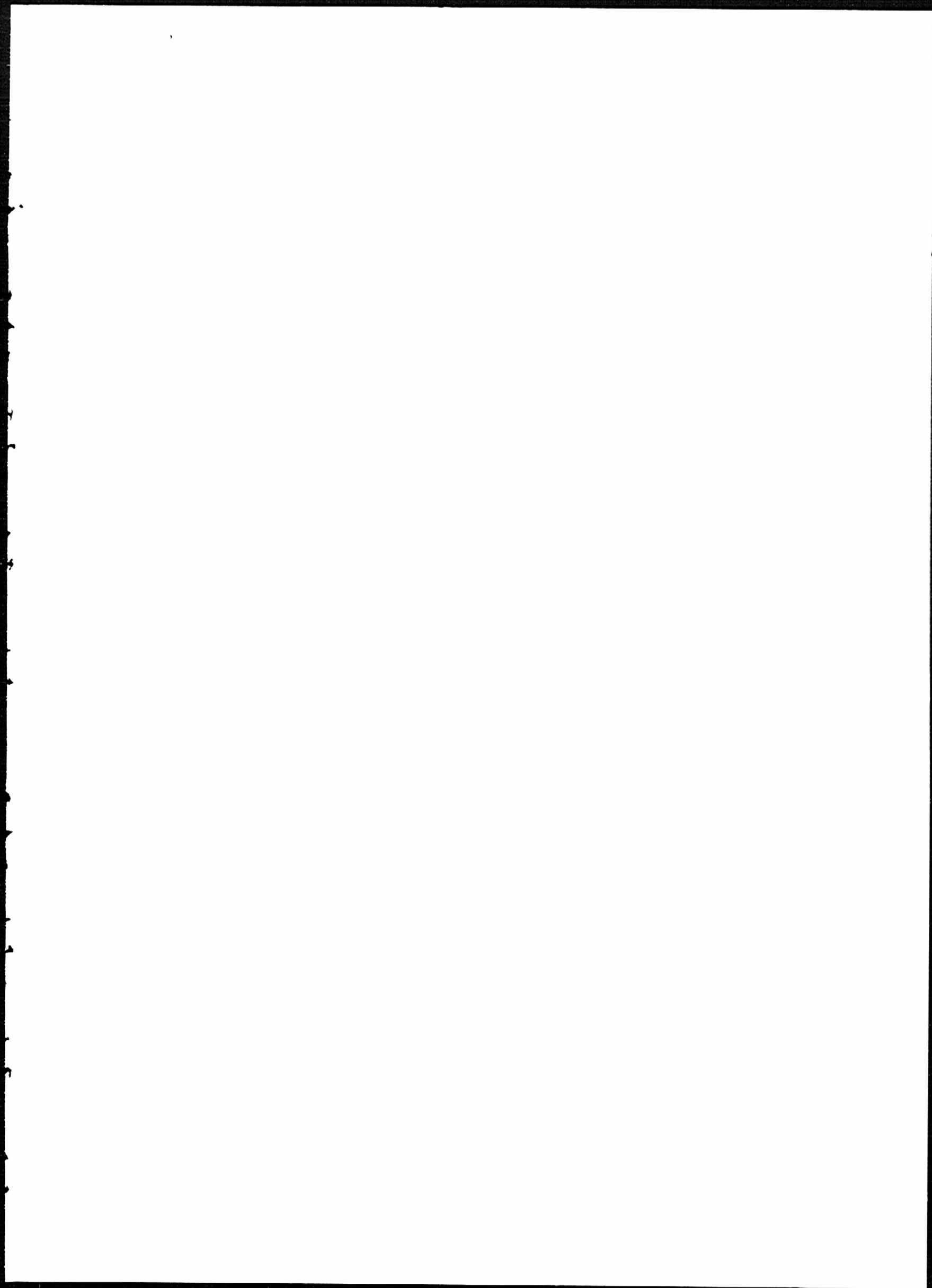
II. Whether the Commission was arbitrary and abused its discretion by the procedure which it followed on remand.

III. Whether the Commission's decisions, in its Order No. 554 and Order No. 573, are consistent with the Court's decision in Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, __ U. S. App. D. C. __ 352 F. 2d 672, and represent a proper application of the statute.



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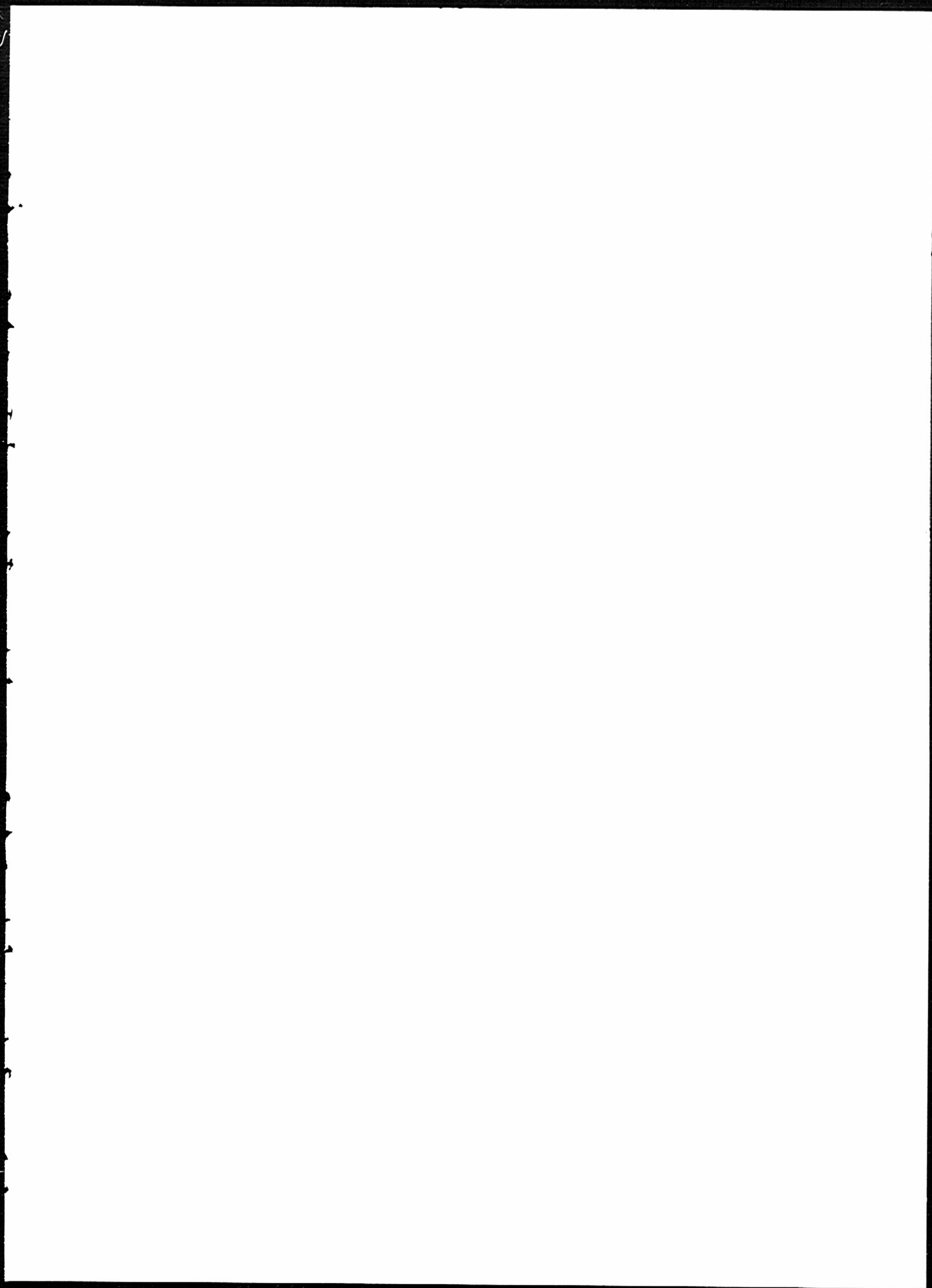
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*Cases or authorities chiefly relied upon are marked by asterisks.



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,140

HOLIDAY TOURS, INC.,

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WASHINGTON METROPOLITAN AREA
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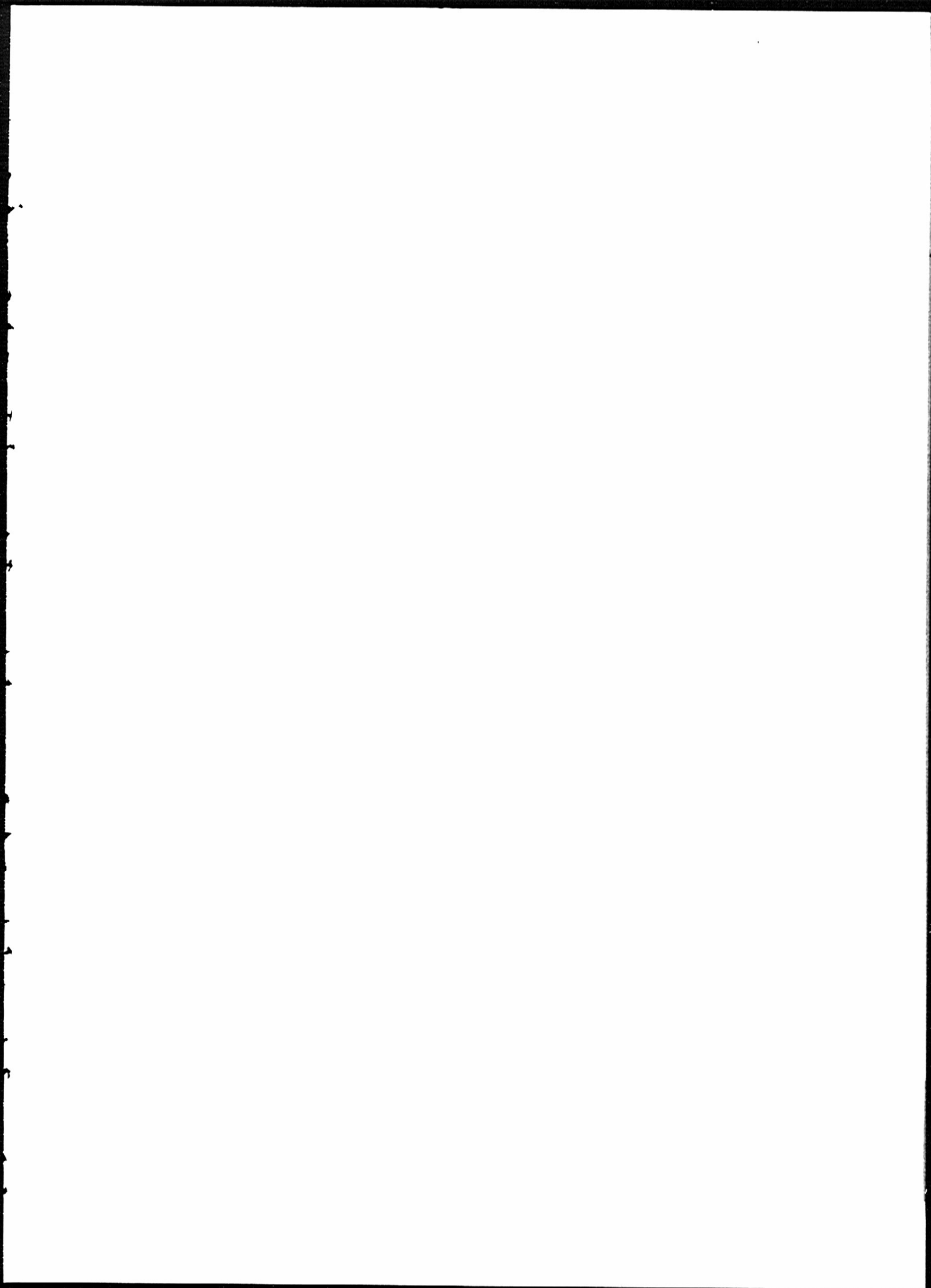
On Petition To Review and Set Aside
Orders Of The Washington Metropolitan
Area Transit Commission

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This case involves a review by the United States Court of Appeals for the District of Columbia Circuit of the validity of orders of respondent, Washington Metropolitan Area Transit Commission, served December 29, 1965 and February 25, 1966, entered in the proceeding before the Commission identified as In The Matter of Holiday Tours, Inc., Application No. 18, Docket No. 31. Petitioner's petition for reconsideration was denied by the Commission.

The jurisdiction of this Court to vacate and set aside the Commission's orders is conferred by Congress in Title I, Article XII, Section 17(a) of the Washington Metropolitan Area Transit Regulation Compact (reproduced in Appendix A).



Public Law 86-794, 74 Stat. 1031, as amended, and was invoked by a Petition to Review filed pursuant to U. S. Ct. of App. D.C. Cir. Rule 38, 28 USCA. Venue of the Court is also established by Section 17(a) of the Compact.

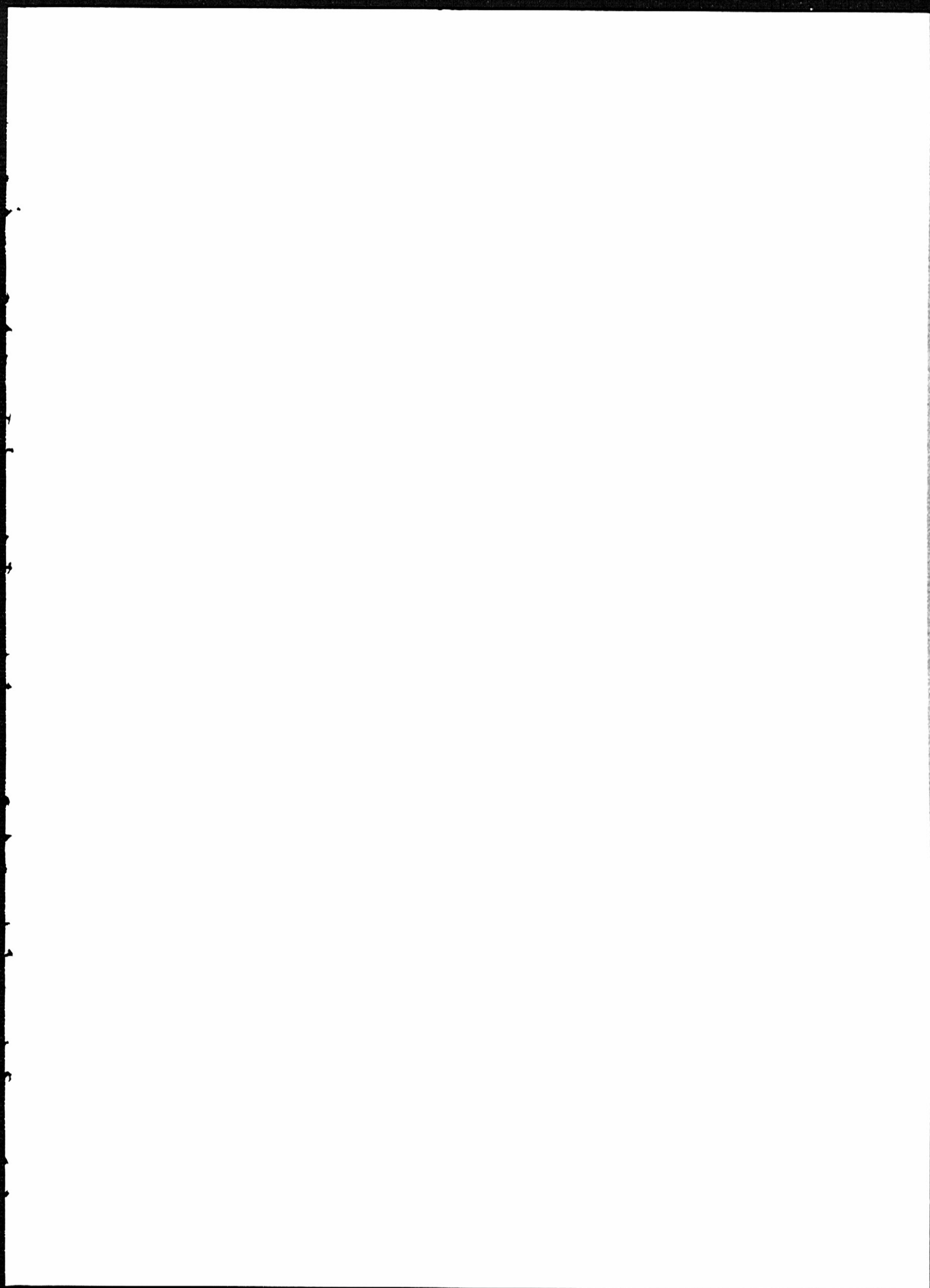
STATEMENT OF CASE

A. The Evidence

The statement of proceedings below is contained in the Petition to Review (reproduced in Appendix B).

The application under review, filed pursuant to Article XII, Section 4(a) of the Washington Metropolitan Area Transit Compact, was the subject of a hearing held in Arlington, Virginia on April 15, 16, 17, 1963 and May 9, 1963, before the General Counsel of the Commission as presiding officer. Appearances were made and accepted on behalf of protestants WV&M Coach Company, Inc., and D. C. Transit System, Inc. and intervenors, The Gray Line, Inc., AB&W Transit Company, Inc., and Diamond Tours, Inc. All but the latter party are intervenors in support of respondent before this Court.

Holiday Tours, Inc., hereinafter referred to as petitioner, is a District of Columbia corporation and has been in corporate existence since November, 1959 (Tr. 20-21). The purpose for which the corporation is organized is as follows:



To operate motor vehicles for transportation of passengers, franchise tours over highways and public roads and to charge and receive compensation therefor. To purchase automobiles, buses, trucks and necessary equipment. To acquire land, buildings for the sale of tickets and the handling of baggage and luggage. To operate newsstands for the sale of newspapers, magazines, cigarettes, cigars, as it relates to the terminal points in business of the corporation. 1/

The business of petitioner as of the critical date, March 22, 1961, was that of transporting passengers for sightseeing purposes (Tr. 23). Its primary place of business on March 22, 1961, was at 8410 Wisconsin Avenue, Bethesda, Maryland (Tr. 24), with offices also maintained, at that time, at the Fairfax Hotel, Washington, D. C. and the Holiday Inn in Arlington, Virginia (Tr. 27). All offices were in operation on March 22, 1961 (Tr. 27).

On the critical date, petitioner was a member of the Bethesda Chevy-Chase Chamber of Commerce, the Washington Board of Trade, the Washington Convention and Visitors Bureau, the Hotel Greeters, the National Organization of

1/ The Articles of Incorporation of petitioner appear in the record below as Exhibit 9 to the Application.

Travel Associations, the Maryland Travel Council, and the Virginia Travel Council (Tr. 26, 84).

Petitioner's practice, on the critical date, was to sell individual tickets to patrons for sightseeing tours (Tr. 28). Limousines operated by petitioner were licensed by the Public Utilities Commission of the District of Columbia (Tr. 66-72, Exhibits 2, 3, and 4). These vehicles were licensed with a so-called "c" identification and were unlimited as to the number of passengers which could be carried (Tr. 69). These vehicles were also licensed in Virginia and Maryland (Tr. 72).

In 1959 petitioner obtained buses from Suburban Transit Company of Maryland for sightseeing purposes (Tr. 57). In 1960 petitioner obtained buses from Atwood's Transport Lines, Inc. for the purpose of sightseeing (Tr. 57-58). Exhibit No. 1 and Exhibit No. 1-A to the Application in the proceeding below demonstrate, by certified letter of the General Manager of Atwood's to the Executive Director of respondent, that Atwood's had made available to the petitioner buses "for their use in the Washington Metropolitan Area" and these consisted of 29, 44 and 45 passenger air conditioned buses. Exhibit 7 below represents invoices of Atwood's Transport

to petitioner for the occasion of charges for "41 passenger bus all day non-Lecture tours" and "45 passenger bus each Day-Lectured sightseeing." These invoices are dated through August and September, 1960.

In 1961 buses were leased from Atwood's Transport Lines, Inc., D. C. Transit System, Inc., and Washington, Virginia and Maryland Coach Company for sightseeing purposes (Tr. 58).

As to Atwood's buses in 1961, drivers were furnished and the charge was by the hour (Tr. 58). Petitioner normally provided a guide to familiarize the driver with the specific operational pattern of petitioner (Tr. 60). In this operation the driver was specifically instructed as to the time schedules and all aspects of the tour (Tr. 98). The Atwood's drivers had no authority to deviate from the instructions of petitioner (Tr. 99). All tickets were sold by petitioner (Tr. 59).

In all cases, when the drivers were not those of petitioner, the tour remained in control of petitioner (Tr. 61, 62, 99). At times, petitioner supplied its own drivers (Tr. 60, 121).

From 1958 to the critical date, petitioner advertised its sightseeing operations by various brochures and

publications (Tr. 82, 83). Exhibit 1-C of the Application below is a brochure showing specific tours by petitioner by Cadillac limousine or air conditioned coach.

The exhibits and testimony demonstrate that control of the tour was in petitioner and the tour patterns were kept intact (Tr. 84), selected by petitioner (Tr. 85) and that passengers were precluded from making independent choices (Tr. 86).

The nature of the operations on March 22, 1961 and prior thereto were as follows:

A vehicle (bus or limousine), would begin at 8410 Wisconsin Avenue at 8 a. m. on weekdays and at 8:30 a. m. on Saturdays and Sundays. The vehicle would proceed to pick up sightseeing patrons at various motels and tourist homes on Wisconsin Avenue between 8:00 and 8:30, then would proceed to the Fairfax Hotel arriving there between 8:30 a. m. and 9:00 a. m., depending upon the starting time. The first stop of the tour would always be the Bureau of Engraving and Printing. If patrons were at other locations they would be picked up generally by another vehicle and tied into the regular tour beginning at the Bureau of Engraving and Printing. After this tie-in, a regular tour pattern would be followed. The schedules were strict, particularly to effect coordination

with the Potomac River steamer ride which departed at a scheduled time (Tr. 68, 90).

Holiday Tours, Inc., on March 22, 1961, had insurance in effect in the amount of \$50,000 and \$100,000 for liability coverage and \$10,000 for property damage. The coverage was with the American Casualty Company which carried Policy No. T-693536 (Tr. 90). Notice of this insurance was duly filed in the States of Maryland, and Virginia and the District of Columbia (Tr. 90).

Prior to March 22, 1961, petitioner made specific inquiry as to the States of Maryland, Virginia and the District of Columbia and the Interstate Commerce Commission as to any requirements to be followed by it (Tr. 90). Petitioner made every effort to comply with all laws of Virginia, Maryland and the federal statutes (Tr. 92). On March 22, 1961 and prior thereto, petitioner had never been stopped from operating limousines or buses by any official of the Commonwealth of Virginia, the State of Maryland or the District of Columbia (Tr. 93). From 1957 through March, 1961 petitioner and its predecessor organization (a partnership) conducted operations openly, without concealment and with no effort whatsoever to disguise the operation (Tr. 93). Petitioner conducted operations with a specific

intent to provide a transportation service to the public (Tr. 93).

Additional evidence of record as to the operations of petitioner in 1959 and 1960 is found in Exhibits 23-28 and Exhibits 31 and 32 showing bus operations during that period. Exhibit 32, for example, shows 1,233 adult and 211 children sightseeing passengers used the bus and limousine services of petitioner from June through October, 1960.

Evidence that petitioner operated both limousine and buses on and prior to March 22, 1961 was corroborated (Tr. 287-88, 386, 390-391). No evidence was presented by parties in opposition to the application below.

B. The Commission Decision

The initial denial of the application, which was the subject of review by this Court in Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, 352 F. 2d 672, found that petitioner was not bona fide engaged in bus operations on the effective date of the Compact inasmuch as (1) petitioner did not hold itself out to provide bus service, (2) the bus markings did not indicate that the buses were under the direction and control of petitioner and (3) the utilization of petitioner's guides on the buses was

not persuasive that direction and control was in petitioner rather than the owners of the vehicles; that petitioner was engaged in taxicab operations and that the carriage of more than six passengers, pursuant to Section 203(b)(2) of the Interstate Commerce Act in limousines was unlawful; that the transportation conducted was not performed under any color of right and therefore was not bona fide or in good faith; and that the transportation was not scheduled but was at the passengers' discretion.

Orders No. 554 and 573, which are the subject of review in the instant proceeding, found that applicant sold its tickets for its sightseeing tours transported by bus or limousine and that such tickets were issued on an individual basis and in its own name. Further, the Commission found that the drivers were in fact required to conform to the routes, the stops, the timing, the buildings and sights to be visited as directed by applicant. However, the Commission concluded, for the first time, that there was no basis for a finding that applicant provided a guide-lecturer for the tours. The Commission's denial was then based upon its conclusions that the owners of the vehicles rather than applicant would be liable to passengers for negligent operation;

that applicant's advertisements as to bus transportation were not persuasive inasmuch as federal and state regulatory authorities had no reason to suspect that any law was being violated; that applicant was bona fide engaged in sightseeing operations by limousine and that buses were merely "chartered" to handle overflow traffic which could not be handled by limousine transportation; that applicant conducted lawful operations inasmuch as it did not "operate" a bus, but "chartered" those vehicles; and that applicant was not bona fide engaged in the transportation of passengers in motor vehicles with a seating capacity in excess of 8 persons on or before March 22, 1961.

THE STATUTE INVOLVED

By joint resolution, Public Law 86-794, 74 Stat. 1031, as amended, Congress gave its consent to the State of Maryland, the District of Columbia and the Commonwealth of Virginia to effectuate the Washington Metropolitan Area Transit Regulation Compact. Contained therein, Title I, Article XII, Section 4(a) provides:

No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation; providing, however, that

if any person was bona fide engaged in transportation subject to this Act, on the effective date of this Act the Commission shall issue such Certificate without requiring further proof that public convenience and necessity will be served by such operations, and without further proceedings, if application for such Certificate is made to the Commission within 90 days after the effective date of this Act. Pending the determination of such application the continuance of such operation shall be lawful. (emphasis added).

By this "grandfather" provision Congress consented to the granting to the Commission the discretion, as pertinent, to judge (1) "bona fide" operation of an applicant on the effective date of March 22, 1961, and (2) the timely filing of an application.^{2/}

STATEMENT OF POINTS

I. The Commission's findings that the transportation in question was performed by the owners of the vehicles rather than by petitioner and that petitioner was not bona fide engaged in transportation pursuant to Article XII, Section 4(a) of the Washington Metropolitan Area Transit Regulation Compact is not supported by substantial evidence and is not in accordance with decisional law.

^{2/} The timeliness of filing is not here and has never been in issue. The final filing date of such application was June 20, 1961. Commission records indicate that Holiday Tours, Inc., petitioner herein, filed this application on June 8, 1961.

II. The Commission's procedure on remand and its failure, under the circumstances, to base its decision on the prior record was arbitrary and an abuse of its discretion.

III. The Commission's decisions, in its Order No. 554 and Order No. 573 are not consistent with the Court's decision in Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, __ U.S. App. D.C. __ 352 F. 2d 672, and are further inconsistent with the applicable statute.

SUMMARY OF ARGUMENT

I. In order to make the ultimate finding, the Court, in its prior decision, suggested that certain subsidiary findings be made. The Commission, on remand, found most of these subsidiary findings in favor of petitioner, while remaining findings were not supported by the evidence of record. Thus, the Commission could not correctly arrive at the ultimate finding, i.e., direction and control of the transportation in question, supported by substantial evidence. Moreover, the Commission's decision is defective because its ultimate conclusion does not follow rationally from the subsidiary facts of record.

Michigan Consolidated Gas Company v. Federal Power Commission, 108 U.S. App. D.C. 409, 283 F. 2d 204. The substantial evidence of record supports an affirmative rather than a negative finding.

II. The Commission's procedure on remand was prejudicial to petitioner by reason of delay and served merely to confuse the factual situation. Had the Commission applied the law of the case to the facts on the existing record, a finding favorable to petitioner would have been made. The Commission thus abused its discretion by a complete reopening, not limited to the issues raised by the Court and further extending the pendency of the case to over 4 1/2 years.

III. The Commission did not apply the law of the case to the facts of record, as it was bound to do. Morand Bros. Beverage Co. v. National Labor Relations Board, (7th Cir. 1953) 204 F. 2d 529, cert. den. 346 U.S. 909. Instead of applying the correct rule, i.e., the control and direction of the transportation (Thompson v. United States, 321 U.S. 19 (1944)), it made a determination between "charter" and "operate" and thus found applicant outside of the statute. The test utilized by respondent has no basis in law. Had the test laid down

in Thompson, this Court, and by the Interstate Commerce Commission been used, an affirmative finding would have been mandatory. Moreover, the Commission's decision has the effect of recognizing multiple "grandfather" rights on the basis of a single transportation service. Such a result was not intended by the statute. United States v. Rosenblum Truck Lines, 315 U.S. 50 (1942).

ARGUMENT

I

The Commission's Findings That the Transportation in Question was Performed by the Owners of the Vehicles Rather Than by Petitioner and That Petitioner was Not Bona Fide Engaged in Transportation Pursuant to Article XII, Section 4(a) of the Washington Metropolitan Area Transit Regulation Compact is Not Supported by Substantial Evidence and is Not in Accordance With Decisional Law.

Respondent's findings and conclusions must be supported by substantial evidence of record, and its failure to give intelligible reasons for findings and conclusions is clear reversible error. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) and City of Lawrence, Massachusetts v. C.A.B. (1st Cir. 1965) 343 F. 2d 582. Here, respondent's subsidiary and ultimate findings are without record support and its reasoning incomprehensible.

In its prior decision, this Court held that an applicant seeking a "grandfather" certificate under the Compact must show that it controlled and directed the bus transportation to such an extent as to make it responsible to the passengers and to the public for the operations. This rule, urged by petitioner in the prior case, citing Dixie Ohio Express Co., Common Carrier Application, 17 M.C.C. 735 (1939), among others, was improperly treated by respondent and will be argued in Part III of this brief. It is to the subsidiary findings, which were suggested by the Court, that the instant Part is directed.

In light of the above rule, the Court suggested that the case should be remanded for reconsideration and, upon reconsideration, the Commission should make findings (1) as to whether applicant sold the sightseeing tours carried by bus in its own name and issued its own tickets therefor, (2) as to whether the tickets were sold on an individual basis for the tours, (3) as to whether the bus drivers (and the tour passengers) were required to conform to the routes, the stops, the timing, the buildings and sights to be visited, and other details as established and directed by applicant, (4) whether and to what extent

a guide-lecturer was provided by applicant for the tours, (5) whether the applicant was alone responsible to the tour group for provision of the transportation for the tours, (6) as to whether the bus operations were openly conducted without attempts at concealment or disguise and in such a manner as to indicate a real intention to offer and conduct a bus sightseeing operation and (7) whether the applicant intended to comply or believe that it had complied with all applicable federal and state law. Respondent treats, to some extent, most of the suggested findings of the court. However, even though the Commission's new findings are inconsistent, for the most part, with its prior findings in this proceeding, it arrives at the same consistent ultimate finding. It is submitted that such ultimate finding cannot rest upon the subsidiary findings made by the Commission.

As to (1) whether the applicant sold the sightseeing tours carried by bus in its own name and issued its own tickets therefor, the Commission now specifically finds that applicant did indeed sell its own tickets for its sightseeing tours transported by bus in its own name and issued its own tickets therefor.

As to (2), the Commission specifically finds that the tickets were sold on an individual basis for the tours.

As to (3), the Commission specifically finds that the drivers were required to conform to the routes, the stops, the timing, the buildings and sights to be visited, as directed by applicant.

As to (4), the Commission finds that there is no basis for a finding that applicant provided a guide-lecturer for the tours. Such a finding is entirely inconsistent with the Commission's prior findings and is contrary to the record. The Commission's reasoning appears to be based upon the contention that "it is customary in the trade for the bus driver to also act as a guide lecturer" (Sheet 4, Order No. 554). What is "customary in the trade" is wholly immaterial here. The only aspect of practice in the trade to be considered is the practice of applicant on March 22, 1961, because this is the statutory limit of the Commission's powers in a "grandfather" case. The record shows - and there is no contrary evidence - applicant furnished a guide-lecturer so that the tours would be conducted according to the schedule and wishes of Holiday Tours, Inc. (Tr 60-62, 391,

for example). Moreover, Holiday Tours, Inc. at times, furnished its own driver (Tr.60, 386). The Commission's conclusion is directly contrary to the evidence of record and is further contrary to this Court's prior opinion in this case. This Court stated in its prior opinion:

The guide-lecturer might well be deemed to be applicant's guide-lecturer, even after the applicant used the Atwood bus driver as a guide-lecturer. There was evidence that the driver was trained by the applicant and followed its instructions and schedule; and that although he was not paid directly by the applicant for this service, the applicant did pay an amount to the bus owner for his services in this respect. (352 F. 2d at 677, N. 7)

The Court's opinion is entirely consistent with the record where it was stated, for example:

Mr. Davis always insisted on having his own lecturer on the bus until the man was properly trained, and we always got William Robey, and I lectured his bus and showed him the pattern for probably 5 or 6 tours until he got on to the pattern. (Tr. 391).

Therefore, as to (4), the Commission clearly erred by making a finding not supported by the record and, indeed, was directly contrary to unrefuted evidence.

As to (5), the Commission does not treat specifically whether applicant was responsible to the tour group for provision of the transportation for the tour, but goes

to the Court's subsidiary suggestion for making that finding as to whether applicant would have been responsible to the tour passengers for negligent operation of the bus and for failure to conduct the tours outlined in the brochure. In this connection, respondent does not treat the issue of whether the chartering bus company was serving the public directly or was merely an instrument performing a part of the transportation service offered by applicant.

The responsibility for negligent operation of the bus is, we submit, a minor consideration in the overall issue of responsibility to the tour group for all facets of the sightseeing services. Liability for negligence is, of course, dependent upon the factual situation and can be determined only by a court of competent jurisdiction. As a result of any negligent operation, it well may be that the owner would be joined as co-defendant, but such supposition is entirely immaterial. The question - suggested by this Court - with which respondent should have concerned itself with is - who was responsible for the tour? This record shows that tour patrons would respond to Holiday Tours, Inc. advertising (Tr. 81-84), would enter petitioner's office in Bethesda, Maryland or its booth in the Fairfax Hotel or its booth at the

Holiday Inn in Arlington, Virginia, all with the predominately displayed the name of "Holiday Tours, Inc." (Tr. 23-27), would purchase an individual ticket with the name "Holiday Tours, Inc." imprinted thereon (Tr. 59) would arrange for a tour with a Holiday Tours' employee (Tr. 30), and, at that time, having no idea what specific vehicle would be used for the tour, it is submitted that it is contrary to human experience to believe that anyone other than Holiday Tours, Inc. was responsible to transport that patron on the prearranged tour. The basic question which should have been decided by the Commission was the identity of that company or person who controlled and directed the tour - which was concededly Holiday Tours, Inc. - inasmuch as that person held itself out as the one responsible to the tour patron. In these circumstances, petitioner was indeed the carrier. See Thompson v. United States, 321 U.S. 19 (1944).

As to (6), the Commission apparently concludes that tours were not openly conducted because authorities would have no reason to suspect any violation of law. Respondent is thus pleading a conclusion while offering no record support for that conclusion. The owners of the vehicles, Atwood and Suburban Transit, did not purchase the Holiday Tours advertising, did not distribute the Holiday Tours brochures, did not

purchase memberships in various travel and civic organizations, did not purchase space on billboards, did not maintain sightseeing offices under the name of petitioner, and did not advertise bus sightseeing transportation in the name of petitioner. The fact is that petitioner held itself out to perform limousine and bus operations. Petitioner did not tell its patrons it was agent for the owner companies and could not do so consistent with its maintenance of offices throughout the Washington Metropolitan area, maintenance of vehicles and its advertising that it was a company engaged in the business of transporting persons on sightseeing tours. The issue here is:

Were the operations openly conducted, without any element of pretense, disguise or concealment, and in such a manner as to indicate a real intent ^{3/} to conduct and maintain a transportation business?

The Commission offers not one fact of record upon which to base a finding that the operations were not openly conducted. Based upon the evidence, it is difficult to conceive of how much more openly the business could have been conducted. Respondent closes its eyes to the actual

^{3/} Slagle Contract Carrier Application, 2 M.C.C. 127, 142 (1937).

operations conducted on or before the critical date period. Its findings are based upon speculation and not upon facts of record.

As to (7), respondent, for the first time, finds that petitioner showed a proper respect for and an awareness of the law in its operations on and before the critical date. This finding, urged by petitioner throughout five years of this proceeding, has finally been made by respondent. However, in order to arrive at the same consistent ultimate adverse finding, the Commission now takes a new tact by stating that petitioner lawfully "chartered" buses but did not "operate" buses. Thus, respondent finds that this distinction is the significant turning point in the case at this time. The fact remains, before further discussion as to "chartering" is had, that the Commission found in the affirmative as to (7) and that applicant did intend to comply or believe that it had complied with all applicable federal and state laws.

Therefore, as to the suggested findings, the Commission concludes that, of the seven findings, (1) (2) (3) and (7) are in favor of applicant, petitioner here. As to (4) (5) and (6), as argued above, the Commission's

findings are directly contrary to the unrefuted evidence of record.

As to the significance attached to the word "charter" as opposed to the word "operate" the Commission disregards the applicable law. First, it is submitted that the distinction is of no significance inasmuch as the question to be decided here is the identity of the person who controlled and directed the transportation. The fact is that petitioner did obtain buses to be used on sightseeing tours which it controlled and directed. Respondent, without citation of authority, finds an unreal distinction in the words "operate" and "charter". Respondent likens the pertinent operations of petitioner to the actions of a public school providing transportation for school children. A more improper analogy cannot be imagined. The fact is that applicant obtained vehicles in which it transported its tour patrons. Petitioner was in fact a sightseeing company which desired to transport, for profit, members of the public. This, obviously, is hardly an analogy to the transportation of classes of school children. In short, the Commission confuses the word "charter".

Charter Service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on weekends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour plan or arranged by the carrier. Fordham Bus Corporation, Common Carrier Application, 29 M.C.C. 293, 297 (1941) (emphasis added).

Applicant's patrons did not collectively contract for the use of a vehicle. Members of the group were not in privity, but were individual members of the public who individually contracted with applicant for a sightseeing tour. It is conceded by the Commission that the carrier, petitioner here, assembled the groups through its own sales to each individual passenger of a ticket covering a particular trip or tour, planned or arranged by the carrier. This specifically fits within the definition of sightseeing or "special services." It is not a charter service and the analogy to a class of school children will not aid the Commission in its finding.

The Commission also finds solace in the testimony of a former District Supervisor of the Interstate Commerce

Commission who, it was alleged by petitioner below, discussed with petitioner its operations prior to 1961. Again, the Commission's finding cannot be based upon any evidence adduced through this witness inasmuch as the frame of mind of petitioner's management was not dependent upon the Supervisor, but was dependent upon a number of factors including conversations with that Supervisor. The fact that the Supervisor did not recall speaking with petitioner's president (Tr. 148) does not disturb the thus far uncontradicted testimony that such conversations did in fact take place. The Supervisor did not testify that such conversations did not take place, but merely that he did not specifically remember such nonrecurring events which took place six or seven years ago because of the great number of interviews in his capacity as District Supervisor of the Interstate Commerce Commission (Tr. 154-156). Moreover, it developed that this witness was employed by protestant, intervenor here, Gray Line, Inc. (Tr. 153) since his retirement from the Interstate Commerce Commission and the witness appeared on behalf of protestant's counsel (Tr. 154). This pecuniary relationship of the witness with an active protestant coupled with the fact that no evidence on direct

was adduced through the witness except his inability to remember, and one answer to a hypothetical question cannot override any uncontradicted evidence in this proceeding.

Thus, it has been shown clearly that respondent could not arrive at the ultimate finding to be made in this proceeding, i.e., that control and direction of the bus transportation and the responsibility to the passengers and to the public for the operations, other than in favor of the applicant based upon the subsidiary findings suggested by this Court. Most of the findings suggested are conceded to be in favor of the applicant and the remaining are entirely inconsistent with the uncontradicted evidence of record. It has long been held that a ruling of an administrative agency cannot stand as a conclusion where the ultimate fact does not follow rationally from subsidiary facts. Michigan Consolidated Gas Company v. Federal Power Commission, 108 U.S. App. D. C. 409, 283 F. 2d 204. It is submitted that the Commission has committed clear error as its ultimate finding is not based upon substantial evidence of record and does not follow rationally from subsidiary facts.

II

The Commission's Procedure on Remand and Its Failure, Under the Circumstances, to Base its Decision on the Prior Record Was Arbitrary and an Abuse of its Discretion.

It is recognized that an administrative agency cannot be prevented, on remand, to reopen and hold further hearing, or to require the Commission to make its decision on the present record. See Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940). However, the Commission cannot be so limited for the reason that it has a duty to apply the statutory criteria. Easton Publishing Co. v. Federal Communications Commission, 87 U.S. App. D. C. 344, 185 F. 2d 987. In this proceeding the Commission could have applied the statutory criteria based upon the prior record and, upon further hearing, the Commission continued to misapply and failed to apply the statutory criteria.

Eight days following the Court's decision in the prior proceeding, petitioner filed with respondent Commission a request that the findings suggested by the Court be made on the present record and specified the testimony which supported and formed the basis for the findings suggested:

1. Evidence establishing that "the applicant sold the sightseeing tours carried by bus in its own name and issued its own tickets therefor" is found in Transcript pages 28, 99, and 395.
2. Evidence establishing that "tickets were sold on an individual basis for the tours" is found in Transcript pages 28, 99, and 395.
3. Evidence establishing that "the bus drivers (and the tour passengers) were required to conform to the routes, the stops, the timing, the buildings and the sights to be visited, and other details as established and directed by the applicant" is found in Transcript pages 85-86, 99, 388, 392 and 395.
4. Evidence establishing "applicant's responsibility to the tour group and to the public for the tour transportation of operations" is found in Transcript pages 61-62, 81-83, 98-99 and 396.
5. Evidence establishing that "the chartering bus company was merely an instrument performing a part of a sightseeing transportation service offered by the applicant" is found in Transcript pages 66-72, 99, 125, 152-153 and 390-391.
6. Evidence establishing that applicant's "bus operations were openly conducted without attempts at concealment or disguise and in such a manner as to indicate a real intention to offer and conduct a bus sightseeing operation" is found in Transcript pages 81-84, and Exhibits 1-D and 1-C.
7. Evidence establishing that the applicant intended to comply or believe that it complied with all applicable federal and state law is found in Transcript pages 90-93.

Respondent Commission entirely disregarded petitioner's request and, on September 2, 1965, set the matter for further hearing. The order setting the proceeding for further hearing was made over the objection of petitioner. It was submitted below that petitioner's objection was particularly well taken inasmuch as the order did not restrict further hearing to any issues raised by the Court in its opinion, but rather reopened the record in its entirety. It was submitted below, and it is submitted here that this is an abuse of the Commission's discretion.

Upon arriving at the hearing, all counsel were shocked with the announcement that the case would be heard de novo for the reason,

(Commissioner Hooker) The Commission will hear the case de novo. It is known by counsel of record that I am the only Commissioner that participated in the former hearing⁴, and most likely, if it were not heard de novo, they might be--give a valid reason for reversal on appeal (Tr. 4).

Thus, after a further six-month delay, and after this case had pended for 55 months, the Commission's opinion in its denial order submitted that the further hearings were

⁴ The General Counsel of the Commission presided at the original hearing and the denial orders were signed by the Executive Director of the Commission.

necessary in order to "penetrate and explore in depth certain areas of uncertainty." Yet, these "certain areas of uncertainty" remain undefined, just as the Commission refuses to even discuss petitioner's position, following the Court's decision, that the record prior to further hearings contained the pertinent evidence to make up the findings suggested by the Court. The procedure on remand was of no value and merely prolonged the decision below to the prejudice of applicant which was already in dire financial straits. Although respondent contends that the procedure was merely an attempt to give all parties ^{5/} an opportunity to present additional evidence and, by that procedure, was eminently fair to all parties, it is respectfully submitted that the procedure worked to the prejudice of petitioner. Because sufficient evidence was on the record before this respondent in the prior case, the minimal evidence produced in the further hearing merely served to further confuse the issues in this proceeding, and to further place petitioner in an untenable financial position. That the latter allegation is so, is

^{5/} Opposing parties had not submitted any evidence in the prior proceedings, and with one exception, all opposing evidence submitted at the further hearing was stricken from the record.

demonstrably shown by the Commission's petition to dismiss this review on the merits for the reason that petitioner is unable to pay certain fees to respondent as a result of the proceeding below.

While respondent Commission weilds great power and discretion, it must accredit itself by acting in accordance with the judicial tradition of fair play. Morgan v. United States, 304 U. S. 1 (1938). When a cause is remanded "for further proceedings in conformity with the decision of this Court," the law of the case as determined by the Court must be closely followed and strictly applied to the facts by an administrative agency. Morand Bros. Beverage Co. v. National Labor Relations Board, (7th Cir. 1953) 204 F. 2d 529, cert. den 346 U. S. 909. Here the facts on the existing record were clearly sufficient with which to determine the case in accordance with the Court's prior opinion. Yet, respondent unfairly, and to the prejudice of petitioner, completely reopened the record with no regard to the "law of the case." That law was clear as were the facts to which it should have been applied. A complete reopening merely confused the fact situation. The Commission's procedure was in error and was prejudicial to applicant by the delay which it caused. Clearly, an unnecessary delay

renders a small businessman, such as applicant, almost unable to engage in legal proceedings against large business in an effort to procure what is his by statute.

III

The Commission's Decisions, in its Order No. 554 and Order No. 573 are Not Consistent with the Court's Decision in Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, __ U. S. App. D.C. __ 352 F. 2d 672, and are Further Inconsistent with the Applicable Statute.

The Commission's decisions below are inconsistent with the Court's decision inasmuch as respondent does not reach the basic and determinative issue in this proceeding. The Court suggested many findings, but these findings were suggested to be made merely in order that respondent arrive at that basic issue, i.e., whether applicant showed it controlled and directed the bus transportation to such an extent as to make it responsible to the passengers and to the public for the operations.

Respondent adheres to the unfounded belief that the owners of the vehicles, rather than petitioner, were those persons actually engaged in the conceded transportation on the critical date. As already discussed as to the subsidiary findings, such a conclusion is at odds with the

record. Further, that conclusion is inconsistent with the statutory intent. Certainly it was not intended to grant multiple "grandfather" rights on the basis of a single transportation service. United States v. Rosenblum Truck Lines, 315 U. S. 50 (1942). Yet, the Commission's decision leads to the illogical result that each company which made buses available to petitioner would be entitled to an impossible to define area of transportation over which its vehicles, under the control of petitioner, happened to be operating during the critical period.^{6/} Such a result is inconsistent with the statutory scheme and clearly not intended. Consistent with prior decisions, which this Court reviewed in the prior case, it is clear that petitioner held itself out to provide the single transportation by bus. This Court did suggest that the Commission may wish to change its statement in this regard (352 F. 2d at 677). Yet, the Commission reaches the same conclusion, this time without specifically stating it. The error is clear.

^{6/} Petitioner is unaware that the owners of the vehicles used in the transportation under consideration were given "grandfather" certificates for that transportation. It is submitted that it is obvious that they have not.

Moreover, the Commission's preoccupation with ownership is unwarranted. This Court clearly stated that respondent's decision could not rest exclusively on that basis (352 F. 2d at 677). Respondent continues, however, to make ownership the prime factor (under the guise of the unreal distinction between "charter" and "operate") and to ignore, not only this Court's decision, but other decisional law. See Thompson v. United States, 321 U. S. 19 (1944) and Calvin v. United States (E.D.Mo. 1942) 44 F. Supp. 684 where it was specifically held that there is no requirement that the subject vehicles be owned by the carrier.

Respondent thus continues to refuse to make its decision on the determinative issue as framed by the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit and the Interstate Commerce Commission. As to who is, in legal contemplation, the operator of the vehicle, the Interstate Commerce Commission has stated:

It must be noted, however, that the words 'direction', 'control', and 'responsibility' are conclusions dependent upon the facts presented in each individual case. The question cannot be decided by the existence of any single factor such as the name

used on bills of lading or displayed on the vehicles, the method of payment for the service performed or the terms of the agreement between the parties. The answer depends upon a full consideration of all the conditions connected with the transportation service. 7/

Contrary to this Court's prior opinion, and cases cited in support thereof (352 F. 2d at 676, 677 and nt. 6), the Commission fails to make the direction and control test the determining factor. The test referred to was approved by the Supreme Court in Thompson supra. In that case, the "grandfather" applicant did not employ drivers (as was sometimes the case here), did not own the vehicles (as is the case here), nor display its name on the vehicle (as is the case here). But the transportation in Thompson was found to be that of applicant's because of its rigid control over the movement and its retention of responsibility (as is the case here).

Thus, respondent failed to utilize the proper rule - as stated by this Court - to make its ultimate

7/ Boston and Maine Transportation Company, Common Carrier Application, 34 M.C.C. 599 (1942), aff'd sub nom Auclair v. United States, (D.Mass. 1947) 72 F. Supp.160.

finding. Inasmuch as the Commission specifically found, on remand, that petitioner directed and controlled the transportation in question (Sheet 4, Order No. 554 for example) a certificate must issue to applicant.

CONCLUSION

Respondent now concedes that most of the subsidiary findings, suggested to be made by this Court, are in favor of petitioner. Respondent now concedes that petitioner, on the critical date, was operating in good faith, that tickets were issued on an individual basis and in its own name, that the tours were scheduled at the direction of applicant, and that control and direction were in applicant. Under this Court's prior opinion and all pertinent decisional law, this was as far as the Commission needed to go. Yet, the Commission revealed a new basis, to the exclusion of the proper determinative issue, for its denial. As argued above, the service in question was "special service" and not "charter" service. There is no warrant in the law to hold otherwise. To state that the bus transportation in question (which was held out to the public by applicant alone) was "rendered for it" by other carriers, is merely to state that the owners of the vehicles were instruments performing a part of the service offered by applicant. The Commission's basis for decision thus disregards the proper rule.

The action of respondent must have "warrant in the record" and "a reasonable basis in law." American Airlines v. Civil Aeronautics Board, 97 U. S. App. D.C. 324, 231 F. 2d 483. Here, the decision under review lacks both.

WHEREFORE, based upon the above premises, it is respectfully prayed that this Court enjoin, set aside and vacate the orders of respondent under review; that the Court decree that petitioner is entitled to operating authority as sought by application duly filed, or, in the alternative, remand this proceeding to respondent Commission for disposition in accordance with the applicable law; and that the Court grant such other and further relief as may be lawful, just and proper.

Respectfully submitted,

HOLIDAY TOURS, INC.

LEONARD J. JASKIEWICZ

J. WILLIAM CAIN, JR.

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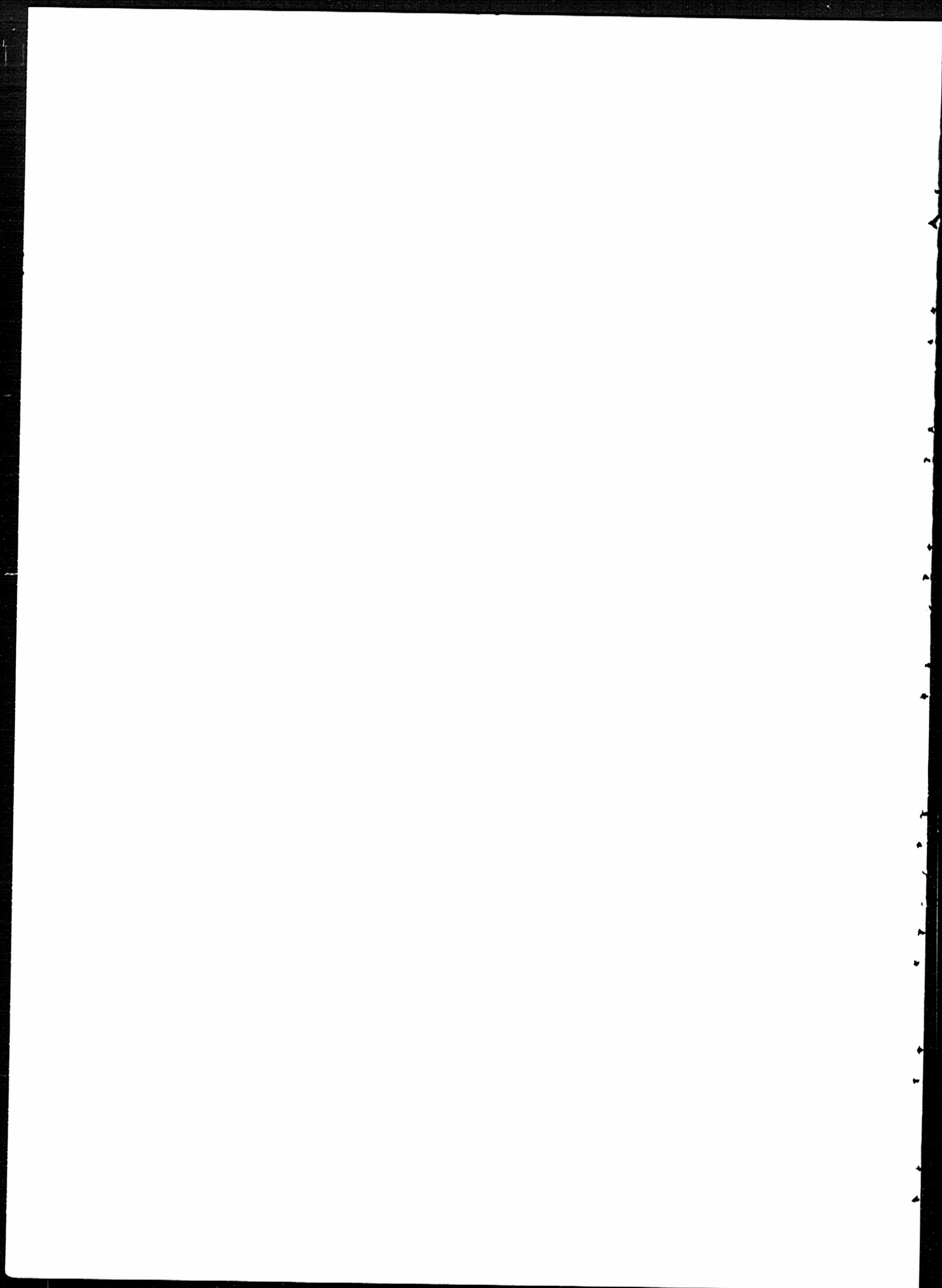
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APPENDIX A

Article XII, Washington Metropolitan
Area Transit Regulation Compact,
Pub.L. 86-794, 74 Stat. 1031

§ 17. (a) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for the fourth circuit, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty (60) days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court

that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification (sic) or setting aside of the original order. The court may affirm or set aside any such order of the Commission, and state the reasons therefor, and such judgment shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in §§239 and 240 of the Judicial Code, as amended (U. S. C. Title 28, §§345 and 347).



APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Holiday Tours, Inc.,)
)
 Petitioner,)
)
 v.)
)
Washington Metropolitan Area)
 Transit Commission,)
)
 Respondent.)

PETITION TO REVIEW
AND SET ASIDE ORDERS OF
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

Comes now Petitioner, Holiday Tours, Inc., by
its undersigned attorneys, and petitions the Court as follows:

1. This is a petition to review, enjoin, suspend
and set aside an order of the respondent, Washington Metro-
politan Area Transit Commission, served February 25, 1966,
made Appendix A, and incorporated herein, arising out of
the proceeding entitled In the Matter of Holiday Tours, Inc.,
Application No. 18, Docket No. 31. This Court has juris-
diction by virtue of Title I, Article XII, §17(a) of the
Washington Metropolitan Area Transit Regulation Compact,

approved by Congress, Public Law 86-794, 74 Stat. 1031, as amended. The instant petition is filed pursuant to U. S. Ct. of App. D. C. Cir. Rule 38, U.S.C.A.

2. Pursuant to the "grandfather" provisions of Title I, Article XII, §4(a) of the aforementioned Compact, Petitioner, Holiday Tours, Inc., of Washington, D. C., duly filed an application to the Washington Metropolitan Area Transit Commission on June 8, 1961, seeking a certificate of public convenience and necessity to continue sightseeing and charter operations of,

Passengers and their baggage and special operations in round-trip sightseeing or pleasure tours and in charter operations,

Between all points in the District of Columbia, the Cities of Alexandria, Falls Church, the Counties of Arlington, Fairfax and political subdivisions of the State of Virginia located within those Counties, and the Counties of Montgomery and Prince Georges in the State of Maryland and the political subdivisions of said State located within said Counties.

Passengers and their baggage and special operations in round-trip sightseeing or pleasure tours and in charter operations,

(1) Between all points and places within the District of Columbia, and (2) between all points and places within Montgomery

and Prince Georges Counties within the State of Maryland and the political subdivisions of the State of Maryland located within said Counties.

3. On October 19, 1962, notice of the "grandfather" application was published in the Evening Star newspaper of Washington, D. C., and parties desiring to protest the grant of authority were required to notify the Commission and the applicant within 30 days of the notice. Such formal protests were filed by D. C. Transit System, Inc. and D. C. Transit System of Maryland, Inc., on October 26, 1962, and by Washington, Virginia and Maryland Coach Company, Inc. on November 5, 1962.

4. Hearing on the application was held in Arlington, Virginia on April 15, 16, and 17, 1963 and May 9, 1963 before Russell W. Cunningham, General Counsel of the Commission as presiding officer. Appearances were made and accepted on behalf of protestants W. V. & M. Coach Company, Inc., D. C. Transit System, Inc. and D. C. Transit System of Maryland, Inc. and intervenors, The Gray Lines, Inc., A. B. & W. Transit Company, Inc. and Diamond Tours, Inc.

5. On December 13, 1963, the Commission served its order No. 334 finding that applicant was bona fide engaged

only in performing "taxicab" operations, i.e., vehicles having a sitting capacity of eight passengers or less in addition to the driver.^{1/}

6. Pursuant to the Commission's Rules of Practice, Petitioner here filed a petition for reconsideration of Order No. 334.

7. Order 343 was thereupon served by the Commission denying the petition for reconsideration and affirming the denial of the application in question. Various other motions and petitions were filed on behalf of Petitioner all of which were denied by orders of the Commission.

8. Petitioner thereupon filed a petition with this Court to review the denial orders of the Commission and further requested a stay of the effectiveness of the Commission's orders. Ultimately, stay was granted pending a determination of the merits.

9. The original record in that case, No. 18561, was docketed on July 21, 1964. Following the filing of briefs and argument of counsel, this Court issued its decision

^{1/} Title I, Article XII, §1(c).

on July 14, 1965 setting aside the orders under review and remanding the case to the Commission for further appropriate proceedings in accordance with its opinion.^{2/}

10. One week following the Court's decision, on July 22, 1965, applicant, seeking "to aid the Commission in its reconsideration by specifying the testimony which supports and forms the basis for the findings suggested (by the Court)" filed with the Commission citations to testimony in the original hearings upon which the findings suggested by the Court could be made. Forty-five days later, reply came from the Commission in the form of Order No. 523 setting the matter for further hearing. Petitioner sought reconsideration observing that there was no substantial reason for a complete reopening of the case. The petition was denied by the Commission.

11. Over the objections of the Petitioner, hearings were held before the Commission on October 25, November 8, and December 13, 1965, at Washington, D. C., before various Commissioners of the Transit Commission.

^{2/} Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, 352 F.2d 672 (1965).

12. By Order No. 554, served December 29, 1965, the Commission denied the application in its entirety. Thereafter, Petitioner sought reconsideration of that order.

13. By order served February 25, 1966 and bearing No. 573 the Commission denied the petition for reconsideration filed on behalf of the Petitioner.

14. The Commission's Order No. 573 in Application No. 18, Docket No. 31, is erroneous and void for the following reasons"

A. The Commission action is contrary to the Washington Metropolitan Area Transit Regulation Compact, Title I, Article XII, §4(a) (Public Law 86-794, 74 Stat. 1031, as amended) in that Petitioner was in fact engaged in bona fide operations on the critical date.

B. The Commission action is contrary to the intent of Congress in consenting to the Washington Metropolitan Area Transit Regulation Compact in that established carriers such as Petitioner were the very

ones intended to be protected by the "grandfather" clause.

- C. The Commission action abuses and exceeds its discretion by misapplying and failing to apply the proper statutory standards to this proceeding.
- D. The Commission action abuses and exceeds its discretion by misapplying and failing to apply the proper decisional standards to this proceeding in that it concluded that Petitioner did not perform and/or hold itself out to perform the transportation as described in the application.
- E. The Commission's action is arbitrary and an abuse of its administrative discretion in that it concluded that the owners of leased vehicles, rather than Petitioner, perform the transportation.
- F. The Commission abused its discretion by failing to follow the directions of this Court in Holiday Tours, Inc. v. Washington

Metropolitan Area Transit Commission,

352 F.2d 672 (1965).

- G. The Commission's decision is inconsistent with this Court's decision in Holiday Tours, Inc., supra.
- H. Enforcement of the Commission's order will abrogate certain rights once held by Petitioner which rights constitute Petitioner's business and sole source of income and will unduly jeopardize the economic abilities of Petitioner without due process of law.

PRAYER

WHEREFORE, Petitioner prays:

1. That the United States Court of Appeals for the District of Columbia Circuit enjoin the effectiveness of the order of the Washington Metropolitan Area Transit Commission served February 25, 1966.
2. That upon consideration of the merits, such Court enjoin, set aside, annul and suspend this order and decree that Petitioner is entitled to authority from the Washington Metropolitan Area Transit Commission.

3. That the Court direct the Washington Metropolitan Area Transit Commission to issue to Holiday Tours, Inc. a certificate of public convenience and necessity as requested in the application filed on June 8, 1961.

4. That the Court grant such other and further relief as may be lawful, just and proper in the premises.

Respectfully submitted,

HOLIDAY TOURS, INC.

By /s/ Leonard A. Jaskiewicz
Leonard A. Jaskiewicz

By /s/ J. William Cain, Jr.
J. William Cain, Jr.
600 Madison Building
1155 15th Street, N. W.
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Its Attorneys

Of Counsel:

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Washington, D. C. 20005

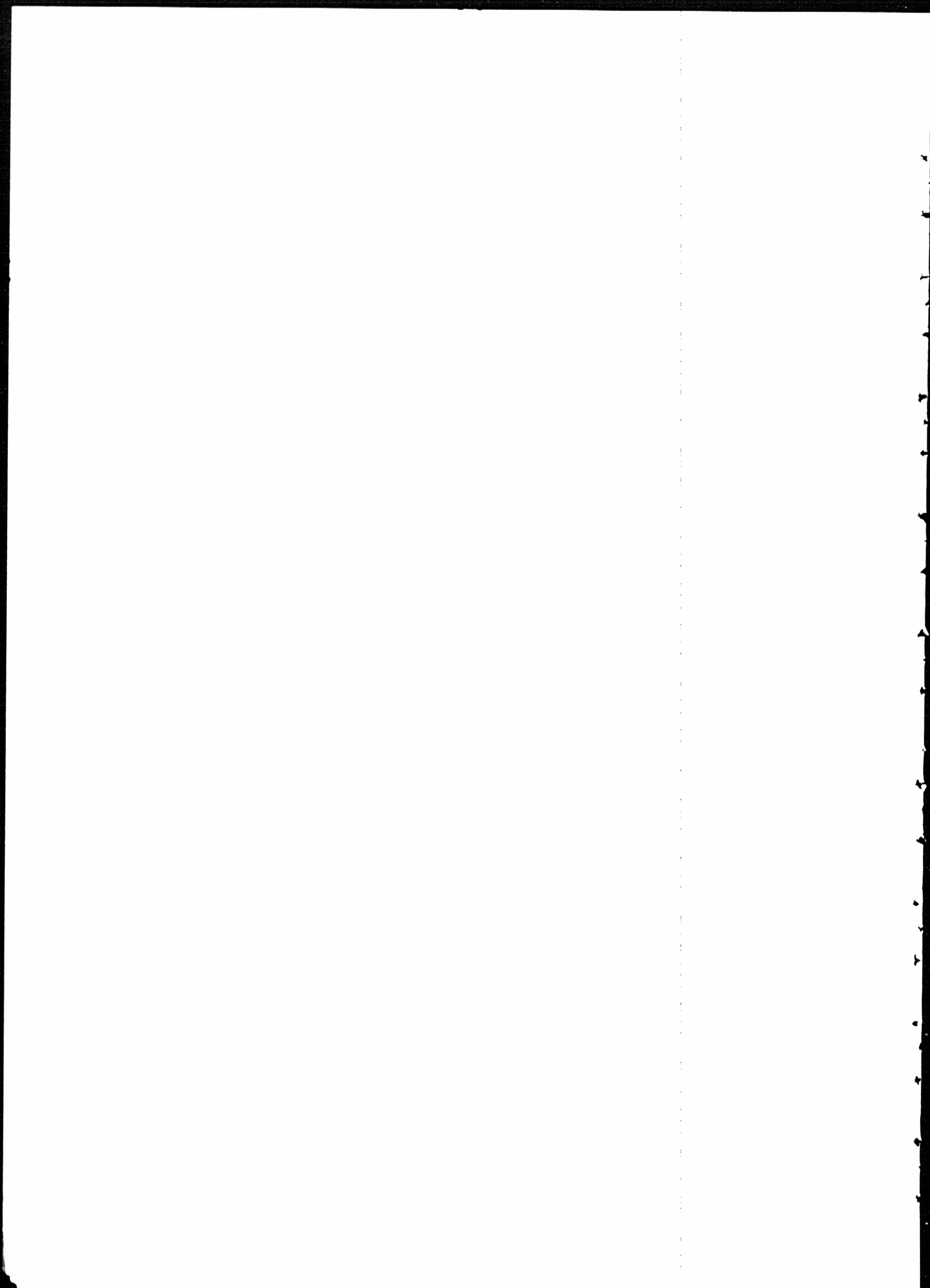
Dated: April 26, 1966

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing document upon Russell W. Cunningham, Esquire, 1815 North Fort Myer Drive, Arlington, Virginia, Manuel J. Davis, Esquire, 1629 K Street, N. W., Washington, D. C. and S. Harrison Kahn, Esquire, Investment Building, Washington, D. C. properly addressed, postage prepaid, and by first-class mail.

Dated at Washington, D. C. this 8th day of July,
1966.

J. WILLIAM CAIN, JR.



BRIEF FOR INTERVENORS

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 20,140

HOLIDAY TOURS, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Respondent.

On Petition To Review and Set Aside
Orders Of The Washington Metropolitan
Area Transit Commission

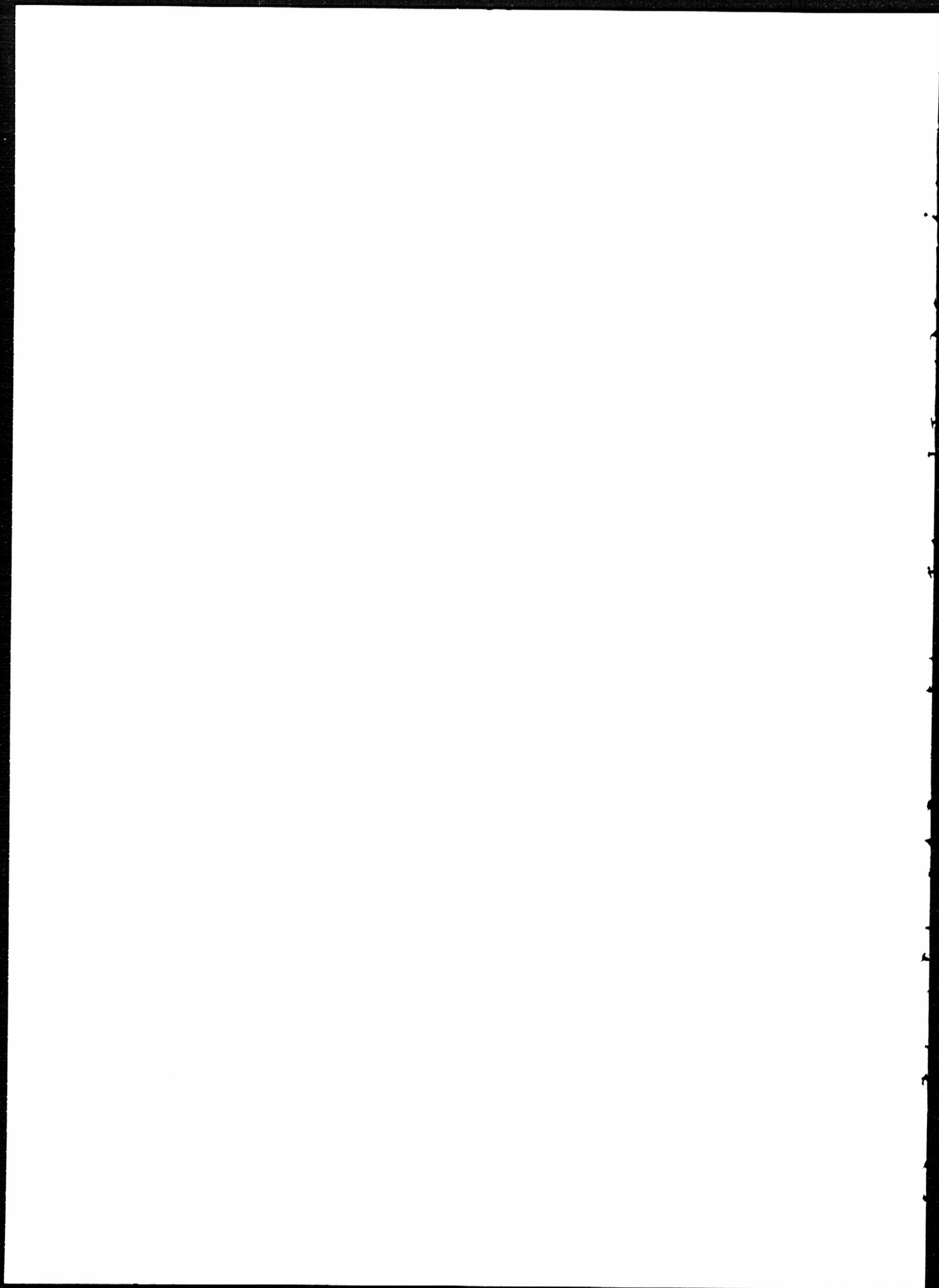
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Maryland Coach Company, Inc.,
INTERVENORS



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,140

HOLIDAY TOURS, INC.,

Petitioner,

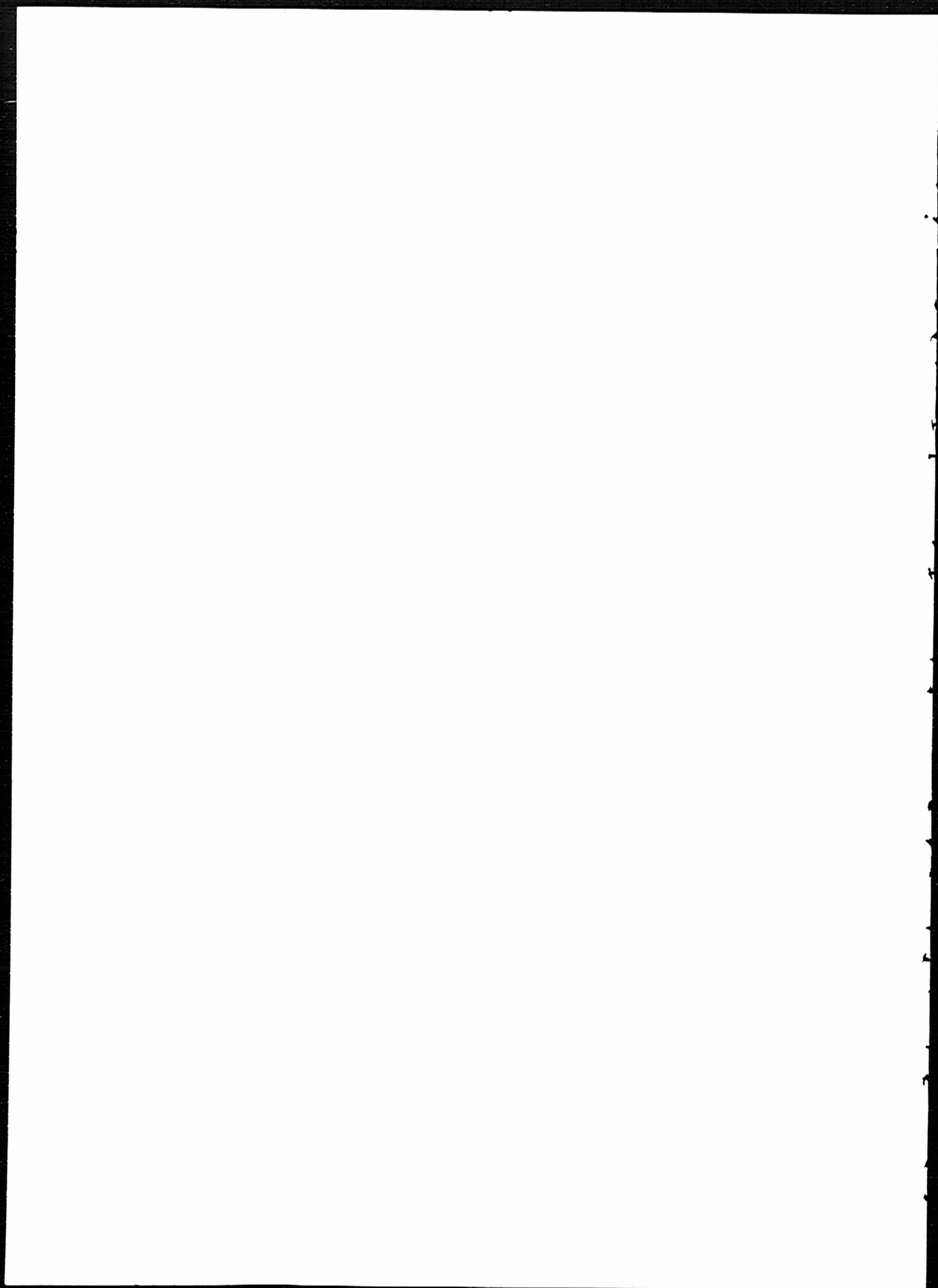
v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE
ORDERS OF THE WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION

Brief for Intervenors
A. B. & W. Transit Company
and The Gray Line, Inc.
D. C. Transit System, Inc. and
Washington, Virginia & Maryland
Coach Company, Inc.



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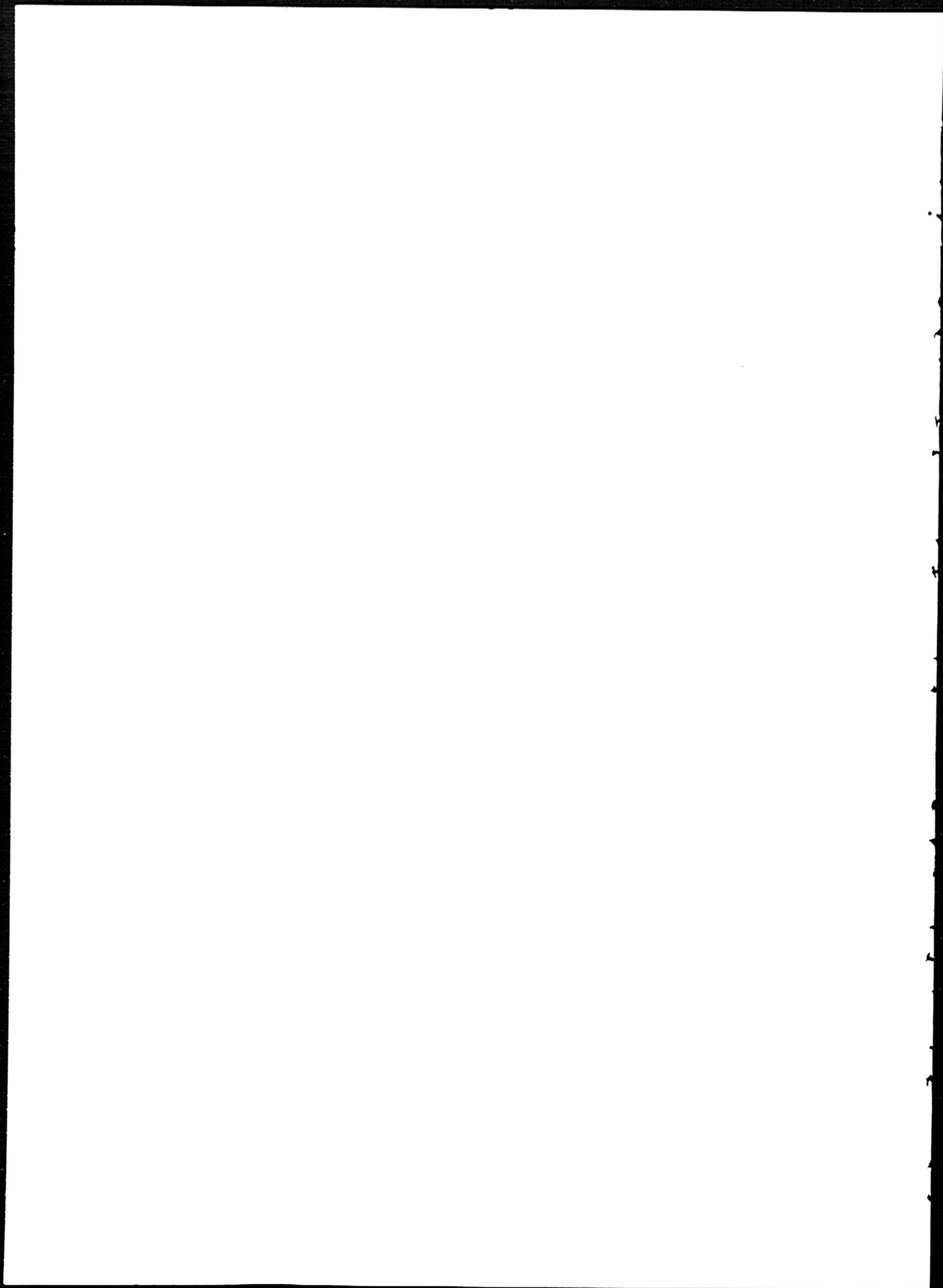


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* Cases or authorities chiefly relied upon are marked by asterisks.

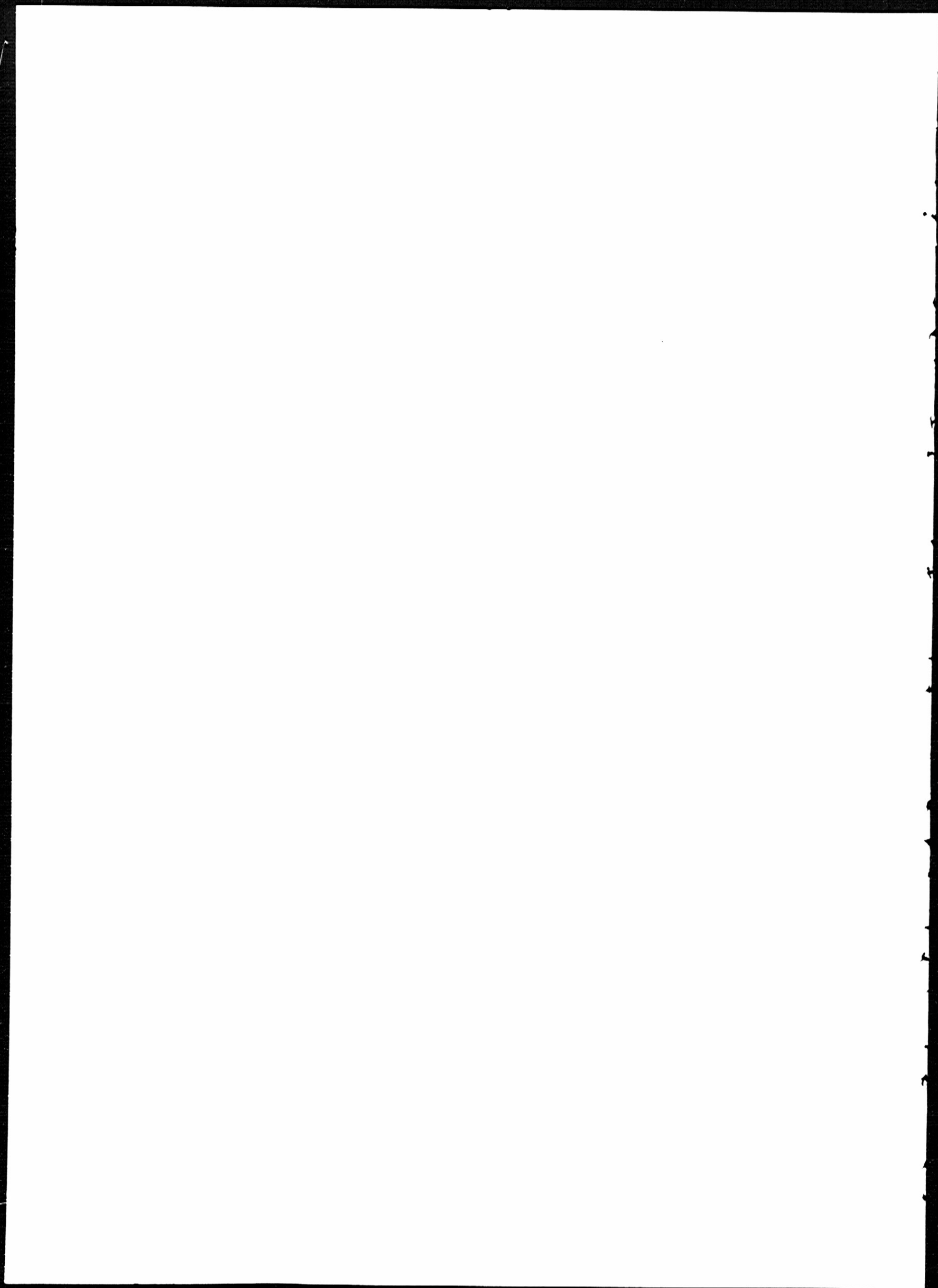
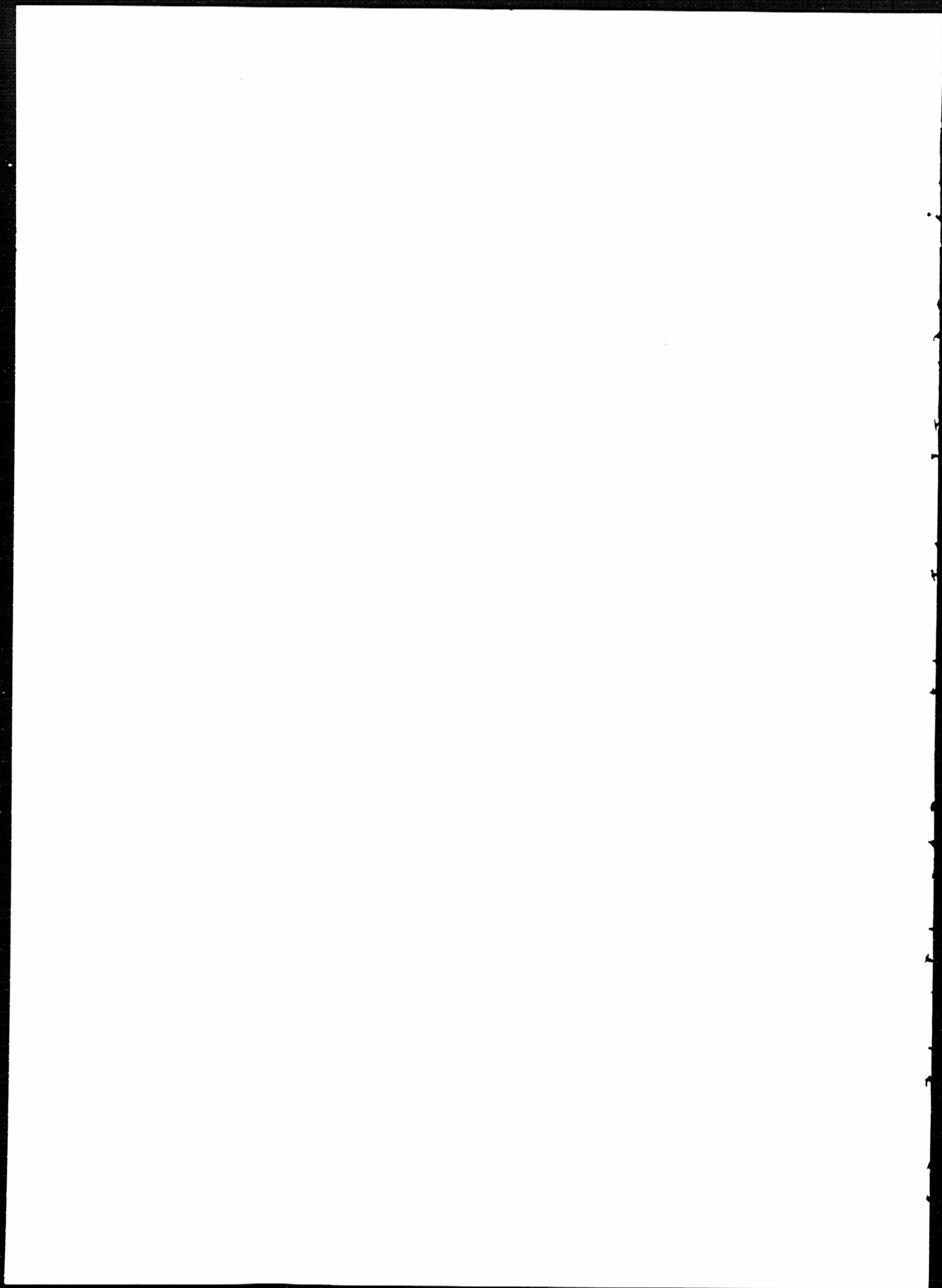


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COUNTER-STATEMENT OF THE CASE

These Intervenors adopt the Statement of the Case as set out by Respondent.

STATUTES AND REGULATIONS INVOLVED

This case involves the applicability of the Act of August 9, 1935, 74th Congress, Ch. 498 (49 Stat. 544, U.S. Code, Title 49, 303 and 311); Act of August 22, 1957, Public Law 85-163 (71 Stat. 411, U.S. Code, Title 49, 303(c)); Act of September 15, 1960, Public Law 86-794 (74 Stat. 103, Title II, Art. XII, Sec. 21); Code of Maryland (1959), Art. 78, Sec. 32; the Code of Virginia, Sec. 56-273, 56-278, 56-338.40; Regulations, Interstate Commerce Commission, 6 F.R. 3042, 3675, 5042, 6309. The relevant provisions of these statutes are set forth in the Appendix.

STATEMENT OF QUESTIONS PRESENTED

Intervenors A. B. & W. Transit Company, The Gray Line, Inc., D. C. Transit System, Inc. and Washington, Virginia & Maryland Coach Company, Inc., believe the questions presented herein are:

1. Whether the Commission properly determined that a party chartering a motor bus from a certificated passenger carrier does not itself thereby become a carrier.

2. Whether the Commission properly determined that on and before March 22, 1961 petitioner was not bona fide engaged in transportation subject to certification pursuant to the "grandfather" terms of the Compact.

SUMMARY OF ARGUMENT

1. Petitioner operated a sightseeing service by limousine vehicle. Occasionally, petitioner would charter a motor bus from a carrier authorized to perform charter bus service. This chartered motor bus would be operated by the authorized chartering bus company.

2. If petitioner's activity can be equated in any manner with "engaging in transportation," such activity would have been in violation of the Interstate Commerce Act and the motor vehicle laws of the District of Columbia and the State of Virginia. Therefore, petitioner could not have been "bona fide engaged in transportation."

3. The Washington Metropolitan Area Transit Commission, taking into full account the decision of this Court in Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, 352 F.2d 672 (1965), properly concluded that petitioner's operations on and before March 22, 1961 do not meet the criteria for certification set forth in the Compact.

ARGUMENT

POINT I

PETITIONER OPERATED A SIGHTSEEING SERVICE BY LIMOUSINE VEHICLE. OCCASIONALLY, PETITIONER WOULD CHARTER A MOTOR BUS FROM A CARRIER AUTHORIZED TO PERFORM CHARTER BUS SERVICE. THIS CHARTERED MOTOR BUS WOULD BE OPERATED BY THE AUTHORIZED CHARTERING BUS COMPANY.

There is no question but that Petitioner owned no buses (Tr. 143-144). Its business was that of selling tickets for sightseeing tours and furnishing transportation in limousines owned and operated by Petitioner (Tr. 28-30).

Occasionally, Petitioner chartered a motor bus from a certificated carrier authorized to perform charter bus service (Tr. 151-152).

Petitioner concedes that it never used the term "motor bus" or "motor coach" in its advertisements (Tr. 225-226).

Moreover, it is clear that Petitioner never controlled the motor buses it chartered. In Dixie Ohio Express Company, - Common Carrier Application, 17 M. C. C. 735, the factors of control of a leasing arrangement were clearly set forth as follows:

If the vehicles of the owner-operators, while being used by the applicant, were operated under its general direction and control, and under its responsibility to the general public as well as to the shipper, then its operations, in which such vehicles were employed, come within the phrase "or by a lease or any other arrangement of Section 203 (a)(14)," and applicant, as to such operations, was a common carrier by motor vehicle.*** The vehicles, while in applicant's service,

were registered under applicant's operating authority and had applicant's name painted, or otherwise shown, thereon. Insurance covering them was arranged and paid for by applicant. Applicant's dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles and also directed their movement over applicant's routes. ***/Emphasis supplied/

In Tauk Tours - Extension, 54 M. C. C. 291, the Commission stated with regard to Dixie Ohio Express Company, supra:

Although that case, which had been followed and quoted with approval many times, dealt with a property carrier, the tests of carrier status there stated are equally applicable here. In other words, in order for applicant here to achieve a carrier status in the conduct of its all-expense tours it would have to appear that applicant took over actual control of, and assumed complete responsibility both to its tour patrons and to the public for, the operation of the buses which it charters. That it does no such thing is apparent from the description of its modus operandi contained in the prior reports. Instead it charters for the use of each tour group certain buses which are operated by drivers who are hired and paid by the equipment owner and who are responsible for the physical operation and maintenance of the equipment throughout the tour. True applicant controls the tour itinerary and the driver takes instruction from him as to routes to be followed and changes therein, departure hours, and stops, but that is not enough to require, or even support, the conclusion that applicant in fact acquires or assumes actual control over, and responsibility to patrons and the public for, the physical operation of the equipment in which its tours are conducted. Clearly applicant is not in the described operations operating as a carrier by motor vehicle. This conclusion conforms to numerous precedents beginning with Cain Broker Application, 2 M. C. C. 633 /Emphasis supplied/.

Petitioner had no insurance in regard to motor bus operations
(Tr. 150).

Petitioner did not furnish drivers nor pay the salary of those drivers furnished by the certificated operator from whom Petitioner chartered motor buses (Tr. 152-153).

Petitioner never displayed its name on any motor bus (Tr. 228).

Petitioner thus conducted only a sightseeing service by limousine on and prior to March 22, 1961 (Tr. 28-30).

When Petitioner chartered motor buses, it did so in precisely the same manner as did any civic, religious, educational or social group.

Petitioner paid to the charter bus operator the published tariff charge for the exclusive use of a bus and the services of a driver (Tr. 231).

The fact that Petitioner sold tickets for sightseeing tours and occasionally chartered a motor bus to transport these patrons does not constitute Petitioner a common carrier by motor bus.

Petitioner was not responsible to the public for the safe operations of any bus.

A chartering party has no direct authority over either the chartered motor bus or its driver.

The chartering party may not, for instance, discharge the driver or subject him to discipline.

The chartering party may not direct that the motor bus be utilized in any manner other than that for which it was chartered.

The fact that a certificated carrier supplied a vehicle and driver on charter does not "out of the whole cloth" transform the chartering party into a common carrier. As set forth in Tanner Motor Livery, Ltd.
- Common Carrier Application, 32 M. C. C. 387:

In other instances applicant furnishes a motor vehicle and a driver therefor who takes directions in a general way from the customer in the matter of where to drive and the frequency and duration of the stops to be made. The control which the customer may exercise over the driver and indirectly over the vehicle is very limited in that such person may not discharge a driver, or cause him to use the motor vehicle in a manner contrary to good judgment or to the instructions which he has received from applicant. Actually, the customer is paying for a motor-vehicle service and not merely for the use of a motor vehicle. The possession and control of the motor vehicle while being driven by one of applicant's drivers remains with applicant. We conclude that applicant, as to such operations, is and has been a common carrier by motor vehicle.

In the present situation, the responsibility to the public, the operation of the vehicle and the obligation to conform to established law were undeniably vested solely in the certificated owners and operators of the chartered motor vehicles.

The suggestion, therefore, that Petitioner became a carrier by bus because it chartered buses would do violence to the clear, unambiguous language found in decisions of the Supreme Court, and the regulatory commission having jurisdiction over the motor carrier industry. In Tauck Tours, Inc., Contract Carrier Application, 10 M. C. C. 362, the Commission stated:

Since that time it has conducted throughout the territory so-called round-trip pleasure or sightseeing tours which originate and terminate at New York City and Newark, with no pick-up or discharge of passengers en route, except that, at the convenience of passengers on certain tours to the South the passengers may start and terminate at Washington, D. C. Tickets are sold individually in advance for specific tours.

***In connection with the movements by motor-bus, applicant hires vehicles from carriers which are duly authorized to conduct special or charter operations in the territory involved. The use of each vehicle is paid for on the basis of a flat rate for each round trip, usually figured on a mileage basis, and the operator from whom the motor-bus is secured assumes responsibility as a common carrier of the passengers, pays the chauffeur and all maintenance and operating expenses of the vehicle, and carries public-liability and property-damage insurance. ***The chauffeur has sole control over the operation of the vehicle. Applicant, however, employs a conductor who accompanies each tour and whose function it is to take care of the comfort of the passengers and to point out the places of interest on the way. /Emphasis supplied/

Limousine service as distinguished from bus service has been historically recognized in transportation even prior to Federal regulation. See Crescent Express Lines v. United States, 320 U.S. 401, 88 L.Ed. 127, 64 S.Ct. 167.

Petitioner's reliance upon Thomson v. United States, 321 U.S. 19, 88 L.Ed. 412, 64 S.Ct. 392, as authority for the proposition that "non-employment of drivers, lack of vehicle ownership and failure to display applicant's name are not determinative of the question of who was the operator," is ill-placed. In Thomson, the railroad applicant:

has consistently held itself out to the general public and to shippers as being engaged in... rail-motor freight

service.... The shipper... is informed by the railroad's tariffs that the railroad at its option may substitute motor vehicle service for rail service.*** It, the railroad, has entered into written contracts for this service with motor vehicle operators....

Petitioner herein clearly did no more than merely charter motor buses sporadically. Petitioner was not engaged in transportation by motor bus.

POINT II

IF PETITIONER'S ACTIVITY CAN BE EQUATED IN ANY MANNER WITH "ENGAGING IN TRANSPORTATION," SUCH ACTIVITY WOULD HAVE BEEN IN VIOLATION OF THE INTERSTATE COMMERCE ACT AND THE MOTOR VEHICLE LAWS OF THE DISTRICT OF COLUMBIA AND THE STATE OF VIRGINIA. THEREFORE, PETITIONER COULD NOT HAVE BEEN "BONA FIDE ENGAGED IN TRANSPORTATION."

The facts in this proceeding effectively negate any bona fides in respect to the alleged operation of buses by Petitioner.

The meaning of bona fides was clearly set out in Brown Motor Freight Lines, Inc., Common Carrier Application, 2 M.C.C. 667. The Interstate Commerce Commission set out the proper elements to be considered:

The term bona fide as used in the "grandfather" clause means more than actual, genuine, physical operation. In law it means also a thing done in good faith without fraud or deceit. In dealing with interstate motor carriers, States have certain powers not dependent upon the absence of Federal legislation, and in the absence of such legislation they had certain other limited powers with which such carriers were bound to comply. They have been upheld in the right to establish reasonable requirements for the registration of motor vehicles and the licensing of drivers. Hendrick v. Maryland, 235 U.S. 610. Under certain conditions, they had the right to require such carriers to obtain a certificate or permit. Clark v. Poor, 274 U.S. 554.

In our opinion, the operations of the two partnerships were not conducted in good faith, but were carried on by means of concealment and subterfuge, with an obvious intent to avoid the existing requirements of the States of Michigan and Indiana relating to motor vehicle operations therein. In the circumstances, we

conclude that their operations were not bona fide in character, and that therefore, applicant has no proper claim to a certificate under the "grandfather" provisions of the act.

Also in R. O. Burbridge, Common Carrier Application, 14

M.C.C. 412, that Commission stated:

It does not appear that applicant holds authority to operate as a carrier from any of the States, although he has conducted operation through most of them at one time or another. /Citing with approval Brown Motor Freight Lines, Inc., Common Carrier Application, 2 M.C.C. 667/ We do not believe that the term "bona fide" can be applied properly to an operation attended by conduct such as that of applicant herein.

Petitioner's claim that it was bona fide engaged in transportation cannot be supported in law or in fact.

Petitioner's reliance upon Blue Line Sightseeing Co. v. Washington Metropolitan Area Transit Commission, 346 F.2d 836 is misplaced.

Blue Line held that bona fide operations need not be predicated upon formal legal authority; however, the Court stated that the good faith issue is primarily a question of fact for the Commission to determine.

Blue Line was ultimately granted certificated authority based upon the particular facts of that case, including the fact that buses operated by Blue Line were marked and identifiable as Blue Line buses, and the fact that Blue Line had obtained authorities from the District of Columbia and the Commonwealth of Virginia.

Petitioner here chartered motor buses on only a sporadic basis, and only two years prior to the effective date of the Compact (Tr. 287-288).

Petitioner had no authority issued by the Interstate Commerce Commission to conduct motor bus operations in interstate commerce.

Petitioner had no authority issued by the District of Columbia to operate motor buses.

Petitioner had no authority issued by the Commonwealth of Virginia to operate motor buses.

Petitioner did not lease motor buses (Tr. 285-286, 289).

Nor did any motor bus chartered to transport sightseeing patrons bear upon it Petitioner's name. The chartered motor bus bore the name and identifying characteristics of the carrier from which the bus was chartered (Tr. 306).

The Compact came into being as of the effective date of March 21, 1961. Title II, Article XII, 21. of the Compact requires:

All rules, regulations, orders, decisions or other action prescribed, issued, made, or taken by the Interstate Commerce Commission, the Public Utilities Commission of the District of Columbia, the Public Service Commission of Maryland, or the State Corporation Commission of Virginia, and which are in force at the time this section takes effect, with respect to transportation or persons subject to this Act, shall remain in effect, and be enforceable under this Act and in the manner specified by this Act, according to their terms, as though they had been prescribed, issued, made, or taken by the Commission pursuant to this Act, unless and until otherwise provided by such Commission in the exercise of its powers under this Act. [Emphasis supplied]

No similar language is found in the Interstate Commerce Act.

Thus, the plain language of the Compact emphasizes the unique nature of the initial certificates to be issued by this Commission.

A true "grandfather" proceeding is one in which a carrier is converted from a lawful unregulated carrier into a lawful certificate carrier. This proceeding could more accurately be called a "reissuance" or a "consolidation" proceeding. All three of the former segments of what now is the Washington Metropolitan Area Transit Commission issued certificates to and regulated carriers. Additionally, the Interstate Commerce Commission regulated those carriers operating across state boundary lines.

The basic statute charges this Commission with the duty of reorganizing the diverse authorizations granted to the many different types of carriers by the four agencies heretofore supervising the transportation of passengers.

Thus, the WMATC is charged by Congress and the two State Legislatures with determining the bona fide character of prior legal operations of each carrier -- both certificated operations and carriage incidental to certificated operations. Any interstate operations that were not certificated or authorized under Section 203(b)(8) of the Interstate Commerce Act were illegal when conducted and cannot now be rewarded with a certificate.

The argument that none of the jurisdictions in and through which Petitioner performed its service sought to prevent the conduct thereof in buses is specious. Those jurisdictions properly looked to the owner of the buses as the certificated carrier, and in each instance the bus

carried the name and colors of the true owner who possessed appropriate authority to engage in charter operations. (Tr. 306).

Petitioner cites Earl W. Slagle - Contract Carrier Application, 2 M.C.C. 127, as supporting its purported bona fides. To the contrary, Slagle illustrates what Petitioner could have done in demonstrating good faith.

As to all the States traversed, except Wisconsin, applicant made visits to State authorities, in order to determine how to comply with the State laws. The agent who handles applicant's insurance testified that policies of insurance for the protection of the public were filed with the State authorities in all those States which required it prior to June 1, 1935. Applicant has paid various fees in substantial amounts in several of the States, has encountered various delays in obtaining permits, including delays caused by changes in the State laws, and has had difficulty in determining the extent to which he was subject to some of these laws, if at all. Therefore, the evidence establishes the general willingness of applicant to comply with State laws and the exercise of some diligence on his part to effect such compliance, but he was not in compliance with certain laws while operating in Wisconsin on June 1, 1935, and possibly his operation in Iowa at the time was not in compliance with the laws of that State.

Slagle arose before Federal regulation and confusion existed as to Slagle's contract or common carrier status. Slagle had commenced partial compliance with State laws some three years before his application.

Petitioner cannot cloak itself in Slagle's shadow. Petitioner's only demonstrated contact with any regulatory agency was a letter written to the Virginia Corporation Commission three months after the effective

date of the Compact (Exhibit 5) and four years after Petitioner commenced its limousine sightseeing business (Tr. 23).

Petitioner never applied to the Interstate Commerce Commission for operating authority.

Petitioner never paid fees for the operation of buses to Virginia, Maryland, or the District of Columbia.

Petitioner in no way is in a position similar to that of Slagle.

Moreover, had Petitioner ever inquired of the Interstate Commerce Commission whether its contended operations were lawful, the answer would have been "NO" (Tr. 147-150).

POINT III

THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, TAKING INTO FULL ACCOUNT THE DECISION OF THIS COURT IN HOLIDAY TOURS, INC. v. WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, 352 F.2d 672 (1965), PROPERLY CONCLUDED THAT PETITIONER'S OPERATIONS ON AND BEFORE MARCH 22, 1961 DO NOT MEET THE CRITERIA FOR CERTIFICATION SET FORTH IN THE COMPACT.

In Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, 352 F.2d 672, this Court instructed the Washington Metropolitan Area Transit Commission to consider, "inter alia, as to whether the bus operations were openly conducted...and whether Holiday had complied with or believed that it had complied with all applicable Federal and State law."

Clearly, Petitioner never openly conducted bus operations.

Nor did Petitioner even attempt compliance with any applicable Federal or State law in order to conduct bus operations prior to the effective date of the Compact.

The Washington Metropolitan Area Transit Commission assigned the matter for further hearing at which additional evidence was taken.

All matters directed by the court were fully considered upon all the evidence adduced and the Commission again found that petitioner herein was not bona fide engaged in transportation by motor bus on and before March 22, 1961.

These later findings reinforced the prior decision of the Commission and led inexorably to the conclusion that the application must fail. Application of Holiday Tours, Inc., for a Certificate of Public Convenience and Necessity, Order No. 554, Application No. 18, Docket No. 31.

CONCLUSION

Intervenors submit that the Orders of the Washington Metropolitan Area Transit Commission should be sustained, and the Petition for Review should be denied.

Respectfully submitted,

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The Gray Line, Inc.

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/s/ Manuel J. Davis
Manuel J. Davis

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A P P E N D I X

Act of August 9, 1935, 74th Congress,
Ch. 498, 49 Stat. 554.
U.S. Code, Title 49, Secs. 303(b) and 311.

§303. (b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include:

* * *

(2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini;

* * *

(8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the interstate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each state having jurisdiction...

* * *

§311. - License Required

(a) No person shall for compensation sell or offer for sale transportation subject to this part or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange, for such

transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: Provided, however, that no such person shall engage in transportation subject to this part unless he holds a certificate or permit as provided in this part. In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective certificate or permit issued as provided in this part: And provided further, That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this part or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express or water.

Act of August 3, 1956,
70 Stat. 983, Public Law 957, Chapter 928
U.S. Code, Title 49, Sec. 304

§304. (e) Subject to the provisions of subsection (f) hereof, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them in the furnishing of transportation of property--

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements

prescribed by or under the provisions of this part with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Act of August 22, 1957, Public Law 85-163, 71 Stat. 411.
U.S. Code, Title 49, Sec. 303(c)

§ 303. (c) Except as provided in [sections not applicable] of this title, no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or with any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation...

Washington Metropolitan Area
Transit Regulation Compact,
Act of September 15, 1960, Public Law 86-794,
74 Stat. 103
Title II, Art. XII

§ 21. All rules, regulations, orders, decisions or other action prescribed, issued, made, or taken by the Interstate Commerce Commission, the Public Utilities Commission of the District of Columbia, the Public Service Commission of Maryland, or the State Corporation Commission of Virginia, and which are in force at the time this section takes effect, with respect to transportation or persons subject to this Act, shall remain in effect, and be enforceable under this Act and in the manner specified by this Act, according to their terms, as though they had been prescribed, issued, made, or taken by the Commission pursuant to this Act, unless and until otherwise provided by such Commission in the exercise of its powers under this Act.

Code of Maryland
(1959, ch. 545) Art. 78, Sec. 32

§ 32. (a-1) When permits required. -- With the exceptions enumerated in subsection (b) of this section, no motor vehicle shall be used in the public intrastate transportation for hire, or in any transportation for hire on regular schedules, and between fixed termini (as these terms are

defined in Article 66-1/2, § 2) of passengers, or of property or freight carried by corporations, groups, associations engaged in the transportation of their stockholders, shareholders or members, or their property or freight, (whether on the cooperative plan or otherwise) or in the carriage of flammables, for hire over the improved streets or roads of this State or any political subdivision thereof, without a permit from the Commission to the owner, which shall prescribe the route and schedule, if any, of operation.

Code of Virginia
(1948, p. 976), Sec. 56-278.

§ 56-278. Required certificates of public convenience and necessity. -- No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted.

Code of Virginia
(1950, p. 368), Sec. 56-273.

§ 56-273. Definitions. (d) The term "common carrier by motor vehicle" means any person who undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property for the general public by motor vehicles for compensation over the highways of the State, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water and of express or forwarding companies under this chapter.

(e) The term "restricted common carrier by motor vehicle" means any person who undertakes, whether directly or by a lease or other arrangement, to transport passengers or property of any restricted class or classes by motor vehicle for compensation, whether over regular or irregular routes.

Code of Virginia
(1956, c. 494), Sec. 56-338.40

§ 56-338.40. (c) "Sight-seeing carrier" means a restricted common carrier authorized to transport sight-seers under the provisions of this Chapter. Except as otherwise provided in this chapter, all provisions of law applicable to common carriers of passengers shall apply to sight-seeing carriers. The provisions of this chapter do not apply to special or chartered parties as defined in §56-285.

Regulations,
Interstate Commerce Commission,
6 F.R. 3042, 3675, 5042, 6309
Sec. 178.2(a)

§ 178.2 Definitions

(a) The term "special or chartered party", as used in the regulations in this part, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

Lease and Interchange of Vehicles
by Motor Carriers
Ex Parte No. MC-43
68 M.C.C. 553
Section 207.4

§ 207.4 Other than equipment exchanged between motor common carriers in interchange service as defined in §207.5 of these rules, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

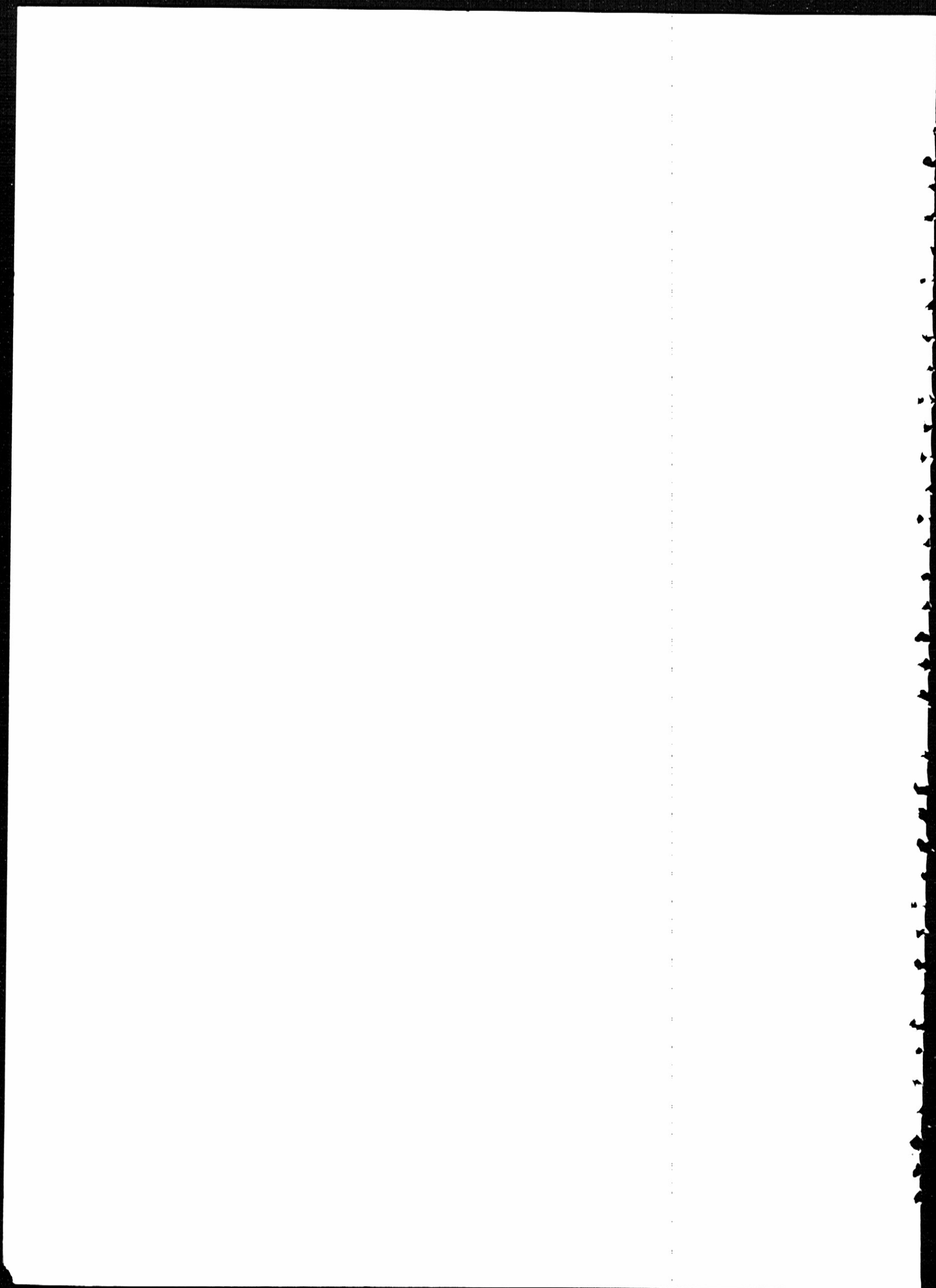
(a) The contract, lease, or other arrangement for the equipment. --

(1) Shall be made between the authorized carrier and the owner of the equipment.

(2) Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contract, leases, or other arrangements.

(3) Shall specify the period for which it applied, which shall not be less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee or the owner;***

(d) The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such carrier, during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Ex Parte No. MC-41; Part 166, Identification of Motor-Carrier Vehicles. If a removable device is used to identify the authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the authorized carrier's own series so as to keep proper record of each of the identification devices in use.



BRIEF FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,140

HOLIDAY TOURS, INC.,
Petitioner,

v.

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,
Respondent.

PETITION FOR REVIEW OF ORDERS ~~of the~~ ^{United States Court of Appeals}
WASHINGTON METROPOLITAN AREA ^{for the District of Columbia Circuit}
TRANSIT COMMISSION

FILED AUG 30 1966

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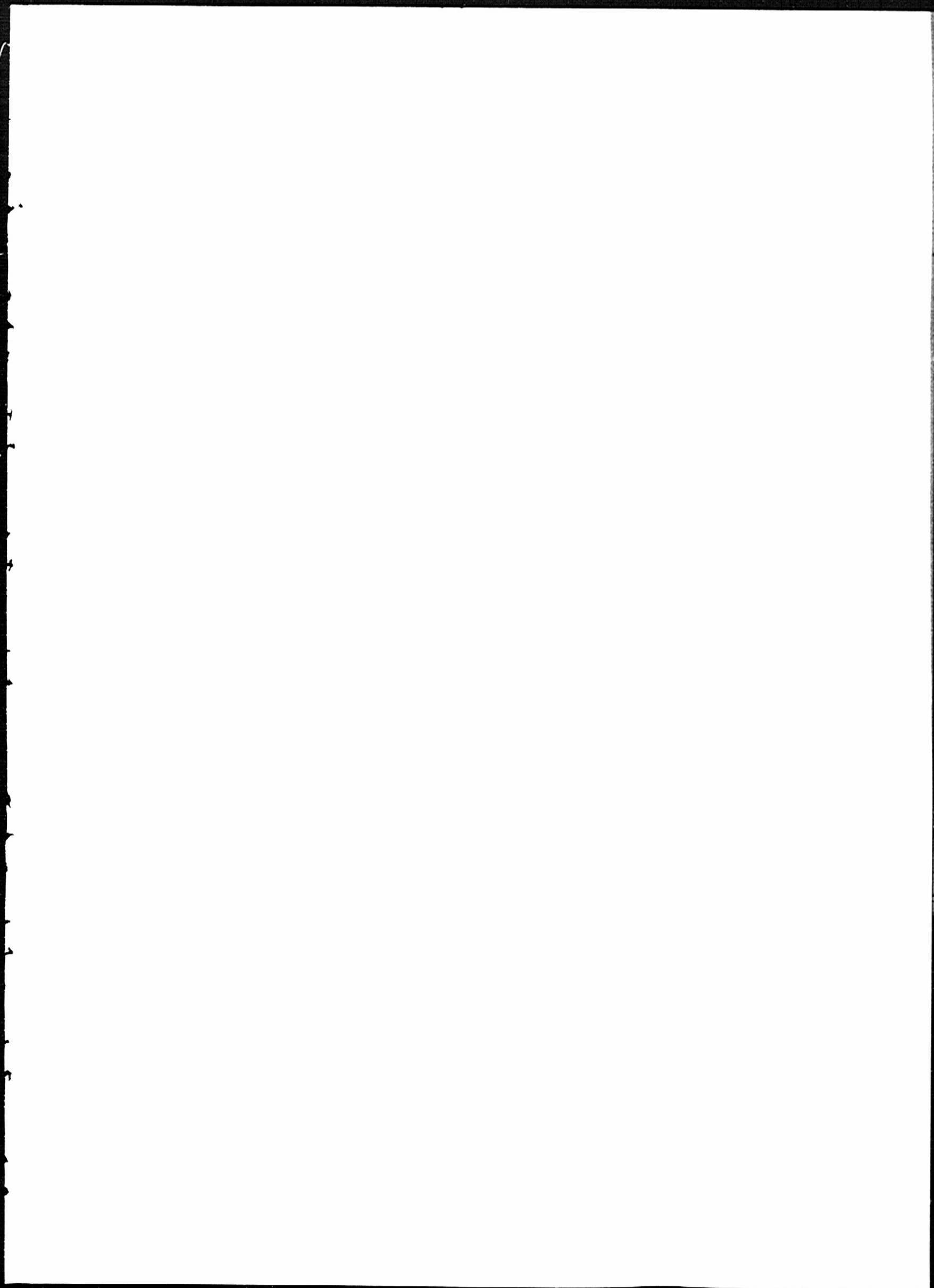
(i)

QUESTIONS PRESENTED

I. Whether the Commission was arbitrary and abused its discretion by the procedure which it followed on remand.

II. Whether the Commission's finding that the bus transportation in question was not performed by petitioner and thus that petitioner is not entitled to a certificate under the statute, is supported by substantial evidence.

III. Whether the Commission's decisions, in its Order No. 554 and Order No. 573, are consistent with the Court's decision in *Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission*, ___ U.S. App. D.C. ___ 352 F.2d 672, and represent a proper application of the statute.



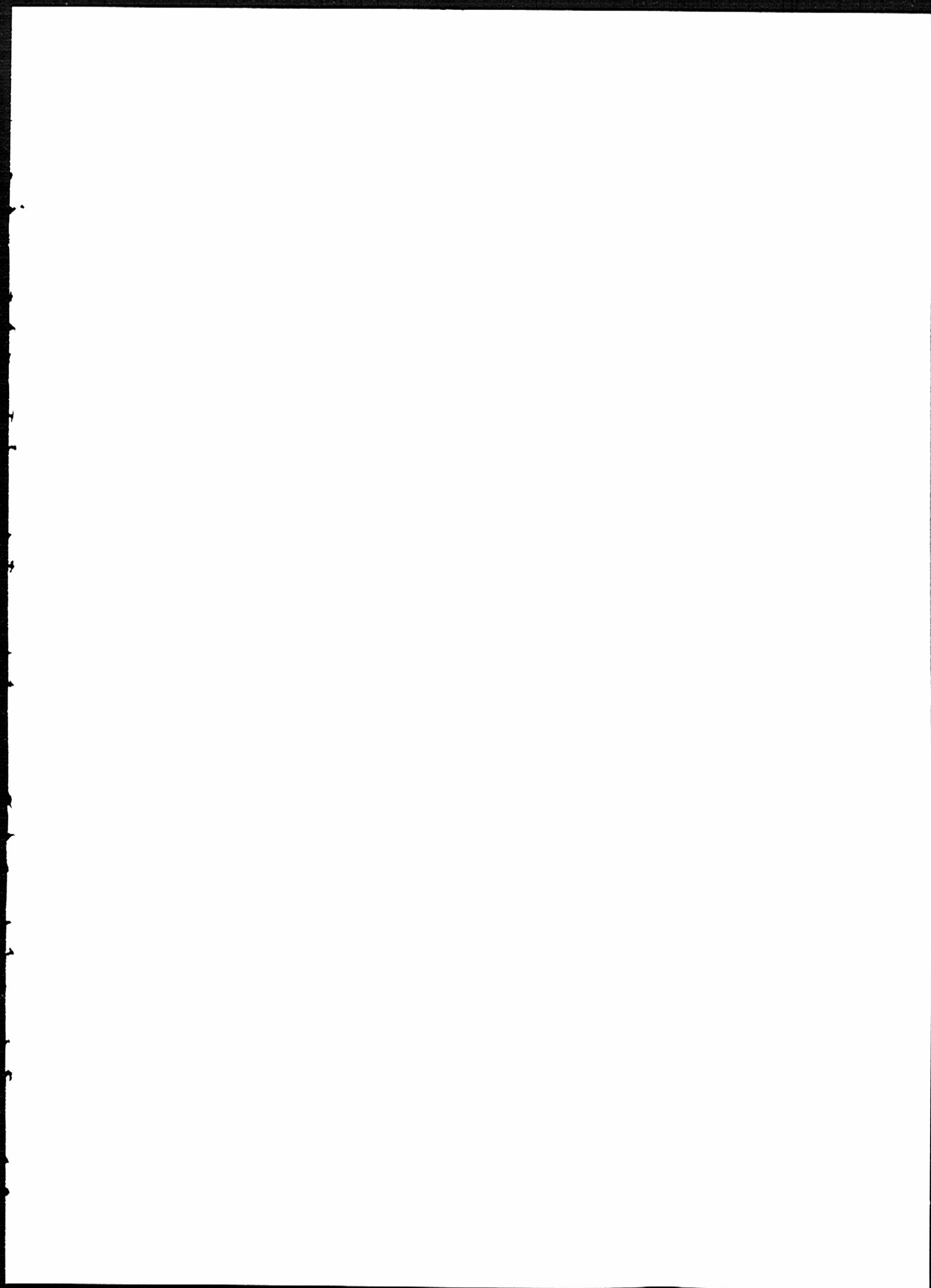
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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

On July 14, 1965, this Court set aside two orders of the Washington Metropolitan Area Transit Commission which had denied, initially and on reconsideration, the "grandfather" application of Holiday Tours, Inc. *Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission*, 352 F.2d 672. The case was "remanded to the Commission for further appropriate proceedings in accordance with this opinion."

On September 2, 1965, the Commission set the matter for further hearing, "to enable the parties to present evidence, consistent with the opinion of said Court." *Order No. 523*. Following an application for reconsideration thereof, and the reply of the protestants thereto, the Commission denied the request to cancel the hearing, because it was "... of the opinion that further hearing is required to provide all parties an opportunity to present evidence bearing upon and relating to those matters raised in the Court's Opinion." *Order No. 535*, served October 19, 1965.

Hearings were held on October 25, November 8, and December 13, 1965. The transcript includes 186 pages of testimony and four (4) exhibits. This record supplements the original record of 600 pages of transcript and a total of 36 exhibits which were marked for identification, 22 of which were rejected by the presiding officer and refused admission into evidence.

The evidence discloses that in 1957, one Walter L. Davis originated a sightseeing operation in the Washington area, called 'Holiday Tours.' From then until November, 1959, the operation was conducted either as a sole proprietorship or as a partnership. In November, 1959, this operation was incorporated in the name of 'Holiday Tours', with Davis as its president and major stockholder. The primary interest of Holiday Tours is related to the sightseeing industry. Its principal place of business was located in Bethesda, Maryland, with other offices for sale of tickets for sightseeing tours located in the Fairfax Hotel in Washington, D.C., and at the Holiday Inn, Arlington, Virginia.

The applicant owned three (3) limousines having a designed seating capacity of eight (8) passengers or less, excluding the driver (Ex. 1, Tr. 479), which vehicles were licensed in the District of Columbia (Ex. 4). Holiday Tours advertised its business in the yellow pages of the telephone directory for several years prior to the effective date of the Compact; however, none of these advertisements specifically offered

transportation in buses and most instances stated that the tours would be conducted in limousines (Ex. 1-D). It also advertised by use of brochures which contained various tour descriptions offered by the applicant (Ex. 1-C, Tr. 34 and 367). In addition to the tour offerings, the applicant would, if requested by a prospective passenger, provide service on an hourly basis (Tr. 367).

Prior to and on March 22, 1961, when persons in excess of the seating capacity of its limousines purchased tickets for its tours, the applicant chartered buses from Atwood's Transport Lines. One of applicant's exhibits was a letter from the president of Atwood's to Mr. Delmer Ison, the Executive Director of the Commission, to the effect that it had "chartered" buses in 1960 to the applicant (Ex. 1). To support the claim that it had utilized bus equipment, applicant's president testified from manifests prepared by him or other employees. These manifests purported to show the number of passengers handled each day and the point of origin. Based on these manifests, Mr. Davis attempted to show on what days the people were transported and how they were transported, i.e., bus or limousine. This was accomplished by grouping the number of people transported from various locations and, where they appeared, the names of various drivers utilized by applicant. Six bills of lading were introduced indicating that Atwood had chartered one bus on eight (8) different occasions in August and September, 1960. The fee for these vehicles was based on the service provided, i.e., whether or not the tour was lectured or non-lectured by Atwood (Ex. 7). The limousines were insured by Holiday Tours (J.A. 89), but none of the vehicles that were chartered were insured by Holiday Tours (J.A. 89-90).

The protestants cross-examined extensively and argued that this was not proper evidence to prove the utilization of buses and that where in many instances the applicant had claimed a group or groups had been moved by bus, the same transportation could have been performed

by the use of several limousines. This argument is substantiated by the testimony of Mr. Davis that on some occasions more than 30 passengers had been transported by the use of three (3) limousines running in relays. The protestants also took the position that the transportation provided by buses was actually rendered by the carriers themselves, and, therefore, Holiday Tours was merely acting in the position of a broker and/or salesman.

Based on these facts, the Commission issued Order No. 334, finding that the bus transportation was that of the duly authorized common carriers, that the transportation of passengers in eight (8) passenger or less vehicles was taxicab operations as defined in Article XII, Section 2(d), and concluding that Holiday Tours, Inc., was not bona fide engaged in any transportation subject to the certificate requirement of Article XII, Section 4(a), and the application was accordingly denied.

Holiday Tours sought, and was granted, reconsideration. Upon reconsideration, the Commission issued Order No. 343, making additional findings, and, modifying its previous order, affirmed the original decision.

As previously noted, those two orders were set aside and remanded to the Commission. This Court said therein:

With respect to rented or chartered equipment, we think the proper rule is, in line with that applied under the Motor Carrier Act of 1935, as amended, 49 U.S.C. § 306, (Supp. V, 1959-60), that the applicant seeking a grandfather certificate under the Compact must show that it controls and directs the bus transportation to such an extent as to make it responsible to the passengers and to the public for the operations.

At the post-remand hearings, Mr. Davis reiterated previous statements that the bus operations were under the direction and control of

Holiday Tours; that he believed that it had a legal right to perform this operation, which belief was based on the oral advice received from Mr. Joseph Clarke, former Interstate Commerce Commission District Supervisor, in 1959. To further show that Holiday Tours believed that it had complied with all applicable Federal and state law prior to March 22, 1961, Mr. Davis testified that he went to Richmond, Virginia, to seek the advice of an attorney there. He told the attorney that he wanted to see about getting an intrastate license to connect with the District of Columbia. He identified the date of the visit to Richmond as being just prior to the 14th of March, 1961. Mr. Davis also introduced a letter from the attorney, dated March 14, 1961, in which the attorney advised Mr. Davis that he had discussed the formation of a Virginia corporation to conduct sightseeing operations solely in Virginia with a representative of the Virginia State Corporation Commission. The witness Davis also testified that he had not attempted to get an intrastate certificate in 1959 or 1960 because at that time he was not operating intrastate in Virginia. In answer to a question from the Chairman of the Commission, Mr. Davis stated that Holiday Tours had never operated intrastate and was interested in getting an intrastate Virginia certificate just before March 22, 1961, "just to have another certificate." The witness also stated that it did not transport groups, like boy scouts.

Mr. Joseph W. Clarke testified that he was formerly employed by the Interstate Commerce Commission as a District Supervisor in Washington, D.C., from about March, 1942, until July, 1960. His function was to deal with the general public and motor carriers in connection with all matters pertaining to transportation of property and passengers in interstate commerce. He stated that he did not have any recollection of the name Walter L. Davis or Holiday Tours, but did not deny that Mr. Davis might have been in his office during 1959. He stated, however, that he would never have told anyone that a certificate was not required for operations in interstate commerce for the transportation of passen-

gers in a motor bus. The witness Clarke described in great detail, in answers to questions on both direct and cross-examination, various types of transportation and their legal status under the Interstate Commerce Act.

The petitioner also adduced the testimony of four (4) witnesses. Two of them stated that they had operated a bus in the Washington Metropolitan Area through 1958, but ceased operations at the instructions of the Interstate Commerce Commission, through Mr. Clarke who told them that they were operating illegally. The remaining two witnesses testified that they had each operated a sightseeing bus in the vicinity of 1955-1957.

On December 29, 1965, the Commission issued Order No. 554, in which it found and concluded that Holiday Tours was not bona fide engaged in the transportation of passengers in motor vehicles with a seating capacity in excess of eight (8) passengers, exclusive of the driver, on or before March 22, 1961, and denied the application of Holiday Tours for a "grandfather" certificate of public convenience and necessity. On January 28, 1966, Holiday Tours filed a petition for reconsideration of Order No. 554 specifying twelve (12) alleged errors. On February 25, 1966, the Commission issued Order No. 573 in which it denied the application for reconsideration of Order No. 554.

SUMMARY OF ARGUMENT

I. The Commission's procedure on remand was expeditious, served to clarify the evidence relating to factors stated by the Court to be considered, and was fair to all parties to the proceeding; and petitioner's challenge is now untimely.

II. The Commission's subsidiary and ultimate findings are supported by substantial evidence.

III. The Commission's factual conclusions are in accord with the

statutory law and the rule stated by this Court in its opinion of July 14, 1965, and were based upon all relevant factors, including the criteria described by the Court in said opinion.

ARGUMENT

I

The Commission's Procedure on Remand Providing for Further Hearing Was Neither Arbitrary Nor an Abuse of Agency Discretion and the Challenge of Petitioner to the Procedure Is Not Timely

Petitioner's attack on the procedural administration of this matter following a remand must fail for two basic reasons. First, it is not timely. Objection to the ordering of further hearing should have been pursued in this Court within sixty (60) days following denial of petitioner's application for reconsideration of the order setting the matter for further hearing. The decision to provide for further hearing was a "final" order at that time. Petitioner's inaction to secure a prohibition of further hearing precludes the Court from disturbing the Commission order on this ground.

Second, the action of the Commission was hardly an abuse of agency discretion when viewed in the light of the Court's opinion. Certainly, neither the letter nor the spirit of the Court's opinion forbade further hearing. The Commission's decision to provide the opportunity for further hearing provided an inherent fairness to all parties to the proceeding and to the Commission itself. Much of the testimony given in the original proceeding was complicated and vigorously disputed. Clarification of several strenuously disputed points was achieved. A minimum amount of time elapsed between the entering of the Court's opinion and the rendition of the Commission's order.

At the outset of the first day of hearing, counsel and the Commis-

sioners discussed at length the reasoning of the Commission for providing for further hearing. The following statements by the Commissioners graphically describe their desire to be fair and to secure the maximum amount of information upon which to base their decision:

VICE CHAIRMAN STORM: Well, if Judge Hooker will excuse me again, it appears to me that we were trying to be fair to everyone and say now if you feel that anything in addition is needed, either you, if your case isn't perfect, it is good but not perfect and you want to make it perfect, or the other side, if they feel that anything at all should be in there to clarify, to make it better for you or for them -- I imagine for them, if they present it -- you would have the opportunity to do it now.

It is not our intention to force you to do something you don't want to do or don't feel is necessary. But I thought that we were being fair in throwing it open so that you or the protestants would be able to present anything at all in reference to these particular findings which the Court directs should be made, throwing it open de novo from that point. (Tr. 25, October 25, 1965 hearing.)

CHAIRMAN DUKE: Since the Court has called the Commission's attention particularly to this element of the problem, I think it would be appropriate for you to be given the opportunity to submit in any evidence even at this date that you might feel bears on that problem, which indicate whether or not the company believed that it had complied with all applicable Federal and state law. And I note, for example, in a cursory reading of the record right now, that you attempted to -- Mr. Davis attempted to indicate a conversation that he had had with Mr. Clark of the Interstate Commerce Commission, but that was ruled inadmissible because of hearsay.

Now did you attempt to remedy that deficiency in your presentation by submitting a deposition or other type of direct testimony from Mr. Clark? (Tr. 38-39, October 25, 1965 hearing.)

CHAIRMAN DUKE: Counsel, you understand, of course, that the thrust of our questioning in the last thirty minutes or so has been to indicate that there are gaps in the testimony and that possibly you might want to supply additional evidence to fulfill the requirement.

We are again giving you that opportunity, and the decision of course, is yours as to whether you want to stand on the record as it is now constituted or whether you would like to introduce additional evidence. (Tr. 41, October 25, 1965 hearing.)

Such statements are hardly indicative of an arbitrary and capricious attitude. If any area of uncertainty remains undefined and unresolved, who must shoulder the responsibility? The Commission certainly gave the petitioner every opportunity to present evidence to bolster *its* arguments. Nevertheless, the petitioner, with one minor exception, declined the opportunity to inform the Commission of its version of the answers to the factors outlined by this Court. In fact, counsel for petitioner even went so far as to claim that one of these factors — relating to the responsibility of negligent operation of buses — was impossible to prove. (Tr. 29, October 25, 1965 hearing.)

In its opinion, setting aside the original orders of the Commission, the Court stated the proper rule of law which governs the ultimate conclusion of the Commission in the instant proceeding. The Court then went on to list over ten (10) specific factors the Commission should consider in arriving at its ultimate conclusion and make findings related thereto. Petitioner complains that the order setting the proceeding for further hearing did not restrict further hearing to any issues raised by the Court (Petitioner's Brief, page 29.) However, on ordering further hearing, the Commission stated that its action was to "... provide all parties an opportunity to present evidence bearing upon and relating to those matters raised in the Court's opinion." *Order No. 536*, served October 19, 1965.

As to the delay occasioned by the procedural aspects of the Commission, it should be noted that Holiday Tours filed its petition to review on April 26, the full 60 days permitted to petition to review. More than four months have passed since that time and the briefing schedule is not yet completed. Thus, already six months have passed since the final action of the Commission. The Commission procedure encompassed nearly 6-1/2 months from the date of the Court's opinion to disposition by the Commission, including the hearing complained of. Petitioner's concern for delay might be more significant if it had promptly filed for review.

Petitioner's allegation on page 30-31 of its brief that the Commission's procedure "further placed petitioner in an untenable financial position" is an unwarranted and improper argument — and is not supported by evidence or reason. During the time between the remand of the Court and the Commission's order hearing complained of, the petitioner was authorized by law to continue the bus operations it had applied for. However, not once in this last 6-month period following Commission denial of the application and of reconsideration has Holiday Tours applied to this Court for a stay of the effectiveness of the Commission's orders, as provided in Article XII, Section 17(b) of the Compact. In the face of this unsubstantiated claim of financial entry, it is difficult to comprehend petitioner's failure to even seek a stay of the Commission's orders.

II

**The Commission's Findings Are Supported
by Substantial Evidence**

The "control and direction" rule was applied by the Commission. Evidence going to the subsidiary factors enumerated by the Court, where available, was considered. The Commission entered findings for these subsidiary factors in route to and as the underlying basis for its ultimate decision as to control and direction. As stated by the Commission, in its order denying reconsideration, "applicant remains unable or unwilling to recognize the distinction found by the Commission between the transportation service it rendered when it sold tickets and operated its limousine service and transportation service rendered for it by the chartering carriers. We have recognized that Holiday Tours was engaged in a bona fide transportation service, but only when said service was operated by it in its limousine vehicles." (*Order No. 573, supra.*) The conclusion rendered it unnecessary — indeed it would have been impossible — for the Commission to have considered the question of bona fideness. The Commission found on all the evidence adduced before it that Holiday Tours, Inc., did not engage in bus transportation. Its findings are very explicit, pointing out that Holiday Tours was engaged in performing sightseeing transportation in exempt limousine vehicles only. Most certainly the Commission found that Holiday Tours sold sightseeing tickets. How else was it to have conducted its limousine sightseeing transportation? Tickets had to be sold. The Commission's findings are just as explicit, however, to the effect that the bus transportation was provided by the authorized carrier. Holiday Tours may have been responsible to its passengers to have secured transportation, but the actual rendition of the bus transportation was that of the authorized carrier. The evidence supports these findings. The bus transportation was performed in vehicles owned, licensed and identified as belonging to the authorized carrier. The bus transportation was ren-

dered by those carriers under certificates of authority held from the ICC and state commissions. The Atwood letter — Ex. 1 — very carefully states that vehicles were *chartered* to Holiday Tours. The bills of lading served upon Holiday Tours clearly indicate a charter movement. The former ICC representative, Mr. Joseph Clarke, testified, under cross examination by petitioner's counsel, that the person chartering a bus had the right to tell the bus driver how to go, and could tell him when to stop.

This whole question of control of the vehicle is of such importance to this case that the following questions and answers must be recited verbatim from the transcript.¹ The questions are by Mr. Jaskiewicz, counsel for petitioner, and the answers are by Mr. Joseph Clarke, former Supervisor of the Interstate Commerce Commission and a recognized authority on the Interstate Commerce Law.

Q. Now, if a limousine operator of that type came to you and said "You discouraged me, Mr. Clarke, from putting nine, ten or more paying passengers in my limousine, and if I have a day in which I have 12 or 14 people, I have got a problem, is there any way I can get around it?" And if that individual asked you "Could I then charter a bus to take my people down to Mt. Vernon and stop off at Lincoln Memorial," what would you have told them?

A. Well, if the bus operator had interstate operating rights to perform the service, I would say then he could charter a bus.

Q. He could charter a bus and go down?

A. Yes.

Q. And under those circumstances he could direct the bus company as to where to stop, when to stop, when to pick up the passengers and when to discharge the passengers, is that correct?

¹ Tr. 165-166, November 8, 1965 hearing.

A. Providing it is a charter operation.

Q. Yes. So that any limousine operator then could do the same — limousine sightseeing operator, could do the same thing by chartering buses say from D.C. Transit, at Woods (sic) or A. B. & W. to the extent they are now operating.

A. If they have the authority to perform.

Q. Was there any limitation, Mr. Clarke, as to what instructions the limousine sightseeing operator could give to the chartering bus company?

A. I don't quite get your question.

Q. Let me rephrase it this way. In 1957 did the Interstate Commerce Commission, particularly your office, issue any instructions which would limit or in any way restrict the instructions which a limousine sightseeing operator could give to the bus company if it chartered a bus?

A. No.

Q. In other words, it could give any kind of instructions it wanted provided the bus company accepted those.

A. Providing it was a lawful charter.

Q. Yes, if it was a lawful charter.

A. Yes.

Q. The bus company could be instructed as to start, stop, pickup, discharge.

A. That is usually what they do on charters.

Q. On sightseeing charters that is usually what they do.

A. That is right.

On redirect, Mr. Clarke was asked the following question: "In your opinion, under those circumstances, who was the carrier, the person who chartered the bus or the bus company who provided the service?"

Mr. Clarke answered: "The bus company that provided the service."²

The questions put to Mr. Clarke by petitioner's counsel were obviously tailored to fit the method of operation of Holiday Tours. Significantly, this expert stated that the carrier was the bus company that provided the service. Thus, the ultimate conclusion that the authorized carriers and not Holiday Tours were the operators of the bus service is directly and explicitly supported by this expert testimony. Other evidence supporting the conclusion were applicant's exhibit No. 1 relating that the Atwood buses were "chartered" to Holiday Tours; the buses were insured by the authorized carrier and not Holiday Tours, whereby passengers on buses were protected from any negligent operation of the bus by Atwood; the buses were driven by Atwood employees, and when the chartering party's (Holiday Tours) itinerary was clear, lectured by Atwood's drivers, for which service Holiday Tours paid Atwood — and not the driver — an extra fee; the vehicles were licensed and identified and operated by Atwood; the Atwood buses were operated pursuant to certificates of authority from the Interstate Commerce Commission and the state commissions; and the invoices of Atwood sent to and paid by Holiday Tours clearly indicate a charge for charter, both lectured and non-lectured, services operated by Atwood.

Some of the factors enumerated by the Court could be answered favorably to the applicant and still not lead to the ultimate conclusion that the applicant was the party controlling and directing the transportation. For example, one of the factors listed by the Court was whether the tickets were sold on an individual basis for the tours. The Commission entered findings on this factor stating that Holiday Tours had indeed sold its tickets on an individual basis for the tours. The Commis-

² Tr. 167, November 8, 1965 hearing.

sion went on to state, however, that one important fact in this entire proceeding may have escaped proper attention. The Commission said:

'Holiday Tours, Inc., was without question, bona fide engaged in sightseeing operations in limousine on March 22, 1961. It had every right to print and sell its tickets in its own name and to transport its passengers in its own limousines. This is what it did.

* * *

"We can see nothing wrong with allowing the passengers, who have already purchased tour tickets to use those tickets for admission on the buses in charter operation. The tour ticket also serves as a means of identification of the passenger in boarding the bus at the various stops along the way. Atwood was being paid the hourly charter rate by the applicant and was not concerned about the financial arrangement between applicant and the tour passengers as represented by the individual tickets. The ticket arrangement was between applicant and the tour passengers. Atwood was being paid the tariff rate." (*Order No. 554, supra*, p. 5.)

The Commission further defined this separation in its order denying reconsideration where it stated, "Applicant remains unable or unwilling to recognize the distinction found by the Commission between the transportation service it rendered when it sold tickets and operated its limousine service, and the transportation service rendered *for it* by the chartering carriers This service did in fact require advertising, sale of individual tickets, and tours conducted openly and without concealment, in vehicles owned by and identified as belonging to the applicant." (*Order No. 573, supra*, p. 1) The Commission then found that the law does not contemplate giving a "grandfather" certificate to one engaged in *selling* sightseeing tours but to one who was "bona fide engaged in transportation." (*Order No. 573, supra*, p. 2.)

Another similar item was advertisement. The evidence was that,

with one exception, all of Holiday Tours advertisements were for limousine operations. The exception was a brochure advertising limousine and coach tours, of which the date of publication was never established. This advertisement of coach service, the Commission found, was consistent with applicant's policy of chartering buses from certificated carriers. Applicant's advertisement of a tour in an air-conditioned coach to its patrons was satisfied by its securing an authorized carrier to perform the bus transportation for it.

While the Court indicated (in footnote 7) that the Atwood driver-lecturer might be deemed to be that of the applicant, the Commission's conclusion was to the contrary. The Commission stated that "it is customary in the trade for the bus driver to also act as a guide-lecturer. The cost of furnishing the driver-guide-lecturer was included in the overall hourly rate paid by the applicant to the chartering bus company pursuant to published tariffs covering charter rates." (*Order No. 554, supra*, pp. 4, 5)

Holiday Tour's selling of tours and the transportation of passengers *in its limousines* were openly conducted, without pretense, disguise, or concealment, and in such a manner to indicate a real intent to conduct and maintain a transportation business.³

Atwood's selling of its charter service and the transportation of those passengers *in its buses* were openly conducted, without pretense, disguise, or concealment, and in such a manner as to indicate a real intent to conduct and maintain a transportation business.

The former does not require a certificate and none was issued to Holiday Tours. The latter does require a certificate and one was issued to Atwood. Multiple "grandfather" rights were not intended to be granted on the basis of a single transportation service. *U.S. v. Rosen-*

³ *Slagle Contract Carrier Application*, 2 MCC 127, 142 (1937).

blum Truck Lines, 315 U.S. 50 (1942). The Commission's decision complies with that intent. In providing for "grandfather" rights, it was the intent of the legislatures to affect a substantial parity between future operations and past bona fide operations. *U.S. v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942).

There are several places in petitioner's brief that it may wish to correct in its reply brief. Specifically, on page 21, it alleges that it performed "maintenance of vehicles". This must refer to limousines, as there is no evidence that it maintained buses, not even the buying of the gasoline. On page 35 of its brief, in comparing the *Thompson* case, petitioner claims (a) that it owned its own vehicles and (b) displayed its name on the vehicle and (c) sometimes employed a driver. Presumably, the latter refers to the few occasions in 1959 (two years before the effective date and one year before it began to rely upon the services of a legal carrier), as there is no evidence that a Holiday Tours employee ever drove an Atwood bus. There is absolutely no evidence that Holiday Tours owned a bus, nor is there any evidence that it displayed its name on any bus.

An Interstate Commerce Commission decision in 1961 involved a "grandfather" application that used "leased" equipment. Protestant contended that applicant had failed to show that it was a common carrier because it did not exercise direction and control over operations in leased equipment. That Commission disagreed, stating:

"A 'grandfather' applicant which uses lease equipment must establish that the operation was under its complete control and direction, with full responsibility to the general public as well as the shippers. Whether a company which is providing transportation service is a motor carrier entitled to operating authority must depend upon the particular facts presented. Here applicant used certain forms in its business which apparently indicate that it did not exercise the requisite responsibil-

ity. The record shows, however, that applicant did, in fact, exercise complete direction and control over the leased equipment, and that it has sustained its burden of proof that it is a common carrier. This conclusion is based upon the following pertinent facts: (1) Applicant paid the Federal transportation tax, (2) it provided the insurance, (3) it holds state-operating authority, (4) it owns a portion of equipment used, (5) its name appears on the equipment, (6) owner-operators are employees of applicant and are not permitted to work for anyone else, (7) they are not liable for damage, and (8) owner--operators are required to submit log sheets and trip reports to applicant." *Southern Shippers, Inc., "grandfather" Application*; No. N.C. 118,222, 15 Fd. Carr. Cas. ¶35,327 (1961).

The petitioner did not meet a single one of these factors.

The first open promouncement of Holiday Tours that the bus transportation was under its direction and control was the filing of its "grandfather" application. The testimony of Mr. Davis that he had been informed by the ICC that bus operations by Holiday Tours would be lawful was completely discredited by the testimony of former ICC representative Clarke and by two witnesses offered to the Commission by the applicant itself. Mr. Davis stated that his information from the ICC came to him in 1959. Yet the witnesses presented by the applicant itself stated emphatically that Mr. Clarke of the ICC has told them to discontinue bus operations in 1958 because such bus operations were illegal. The petitioner does not recite this information in its brief to the Court, merely classifying their testimony as confusing, minor, and of no importance; yet it itself presented uncontradicted impeachment of Mr. Davis' testimony.

Considering the entire record, the substantiality of evidence supports the Commission's findings and ultimate decisions. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 374 (1951).

III

The Commission's Decisions in Its Order No. 554 and Order No. 573 Are Consistent With the Court's Decision in Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, Supra, and Represent a Proper Application of the Statute.

Even a cursory reading of the Commission's decisions shows that they are consistent with the Court's decision. The Commission did reconsider its factual conclusion in light of the rule set out by the Court, and made findings on those factors, as well as others, enumerated in the Court Opinion. In substance, petitioner's complaint is that the Commission did not arrive at the result urged upon it by Holiday Tours, rather than that the Commission failed to follow the stated rule. The Commission explicitly found that "patrons were transported by the chartering carrier in the chartering carriers vehicle. As we have found, that transportation was performed by an authorized carrier. There was no bus transportation by the applicant, bona fide or otherwise. The only bus operations actually conducted were by an authorized, certificated carrier." (*Order No. 573, supra*, pp. 1-2.)

CONCLUSION

The basic reason for a "grandfather" clause is to put one in the same position after the law becomes effective as it was in before the legislative enactment. This is the "substantial parity" spoken of by the United States Supreme Court. This is the effect of the Commission decision. The distinction found by the Commission between the transportation service rendered by Holiday Tours when it sold tickets and operated its limousine service and a transportation service operated and conducted for it by the chartering carriers is clear, and supported by the evidence. The Commission's basis for decision gave

proper regard to the rule enunciated by the Court and considered all relevant factors. Its findings are supported by substantial evidence.

Wherefore, it is respectfully prayed that this Court affirm the orders of the Commission and deny the petition for review.

Respectfully submitted,

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